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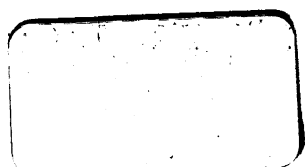
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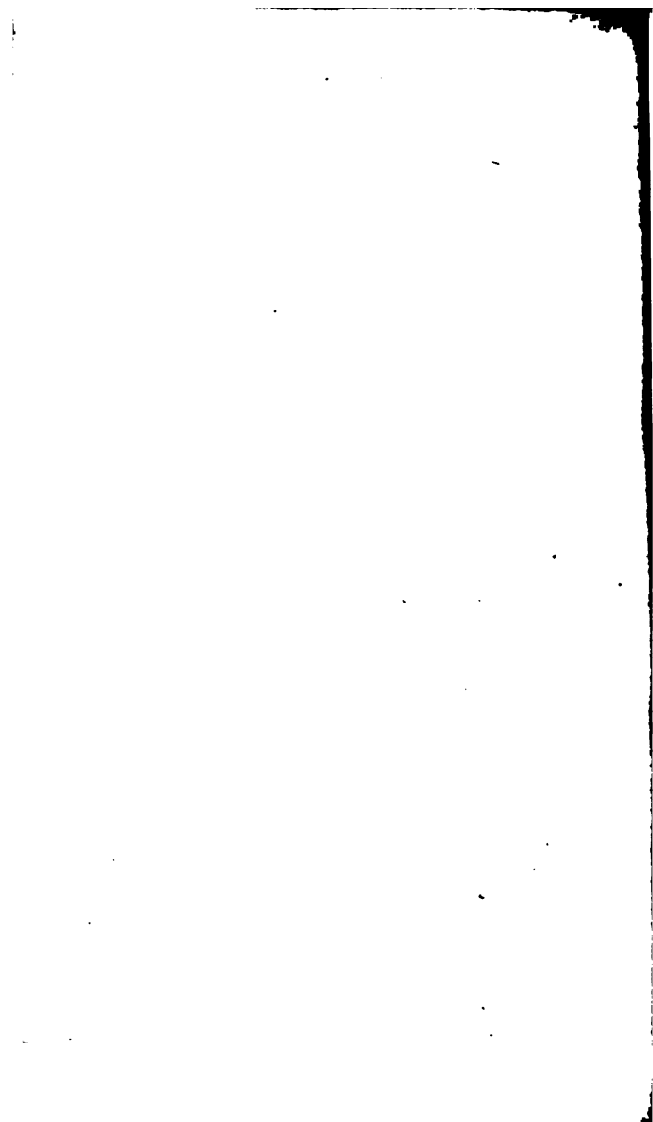
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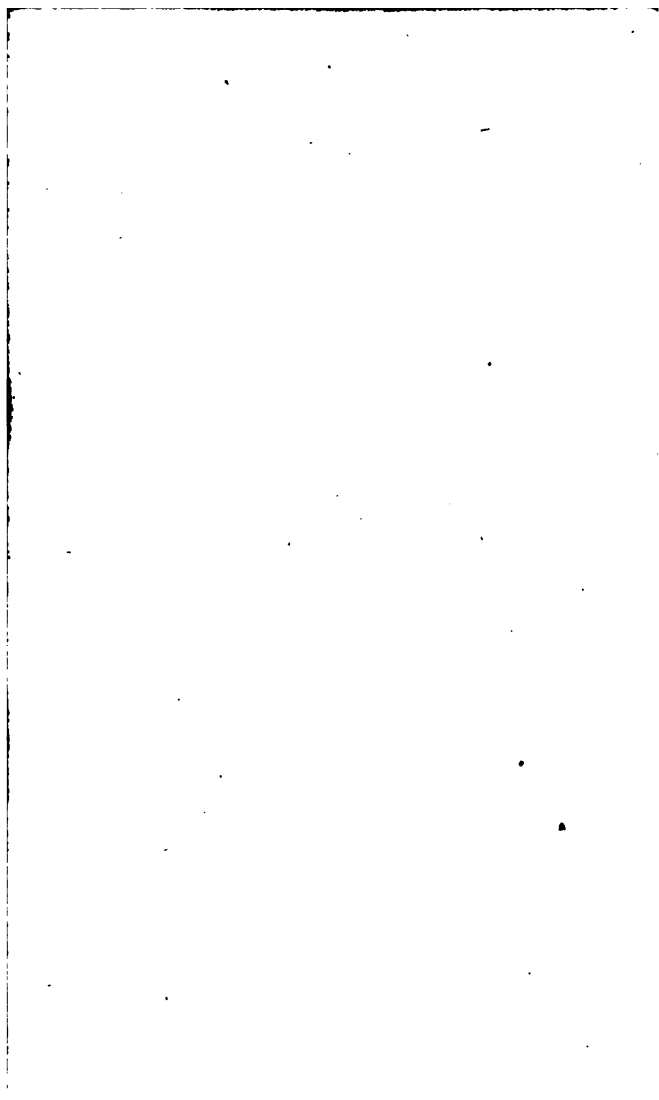
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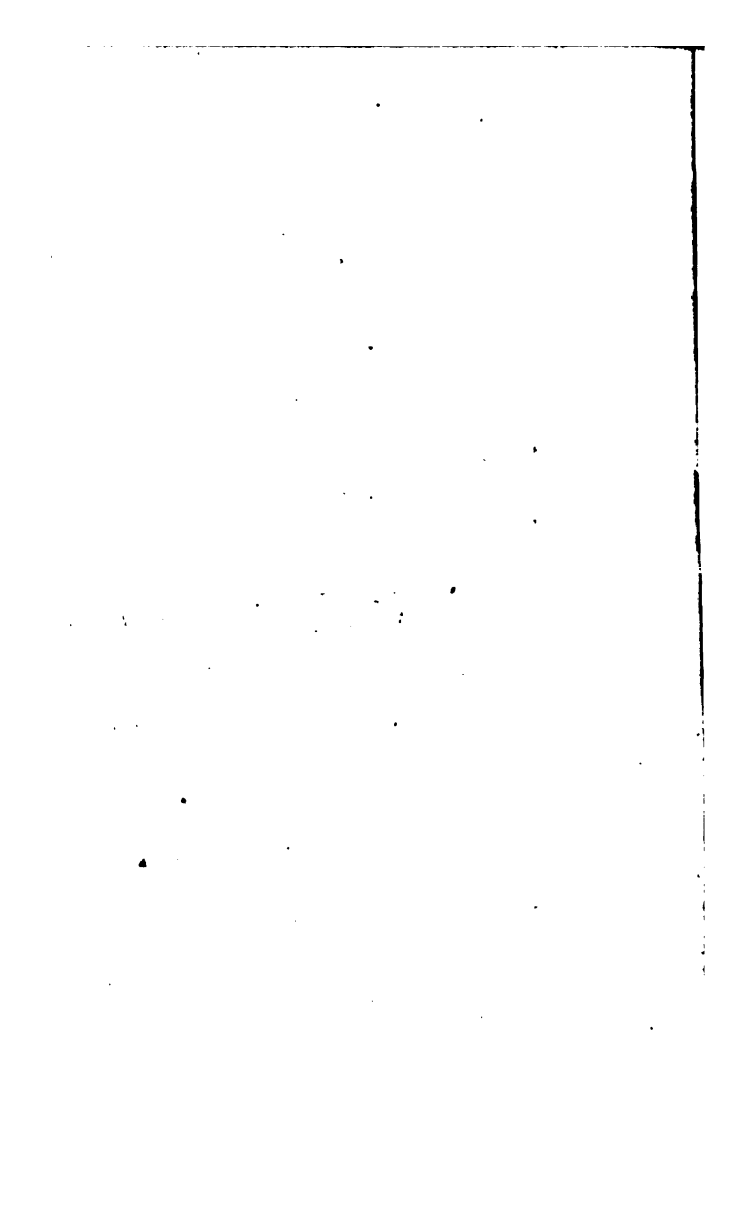
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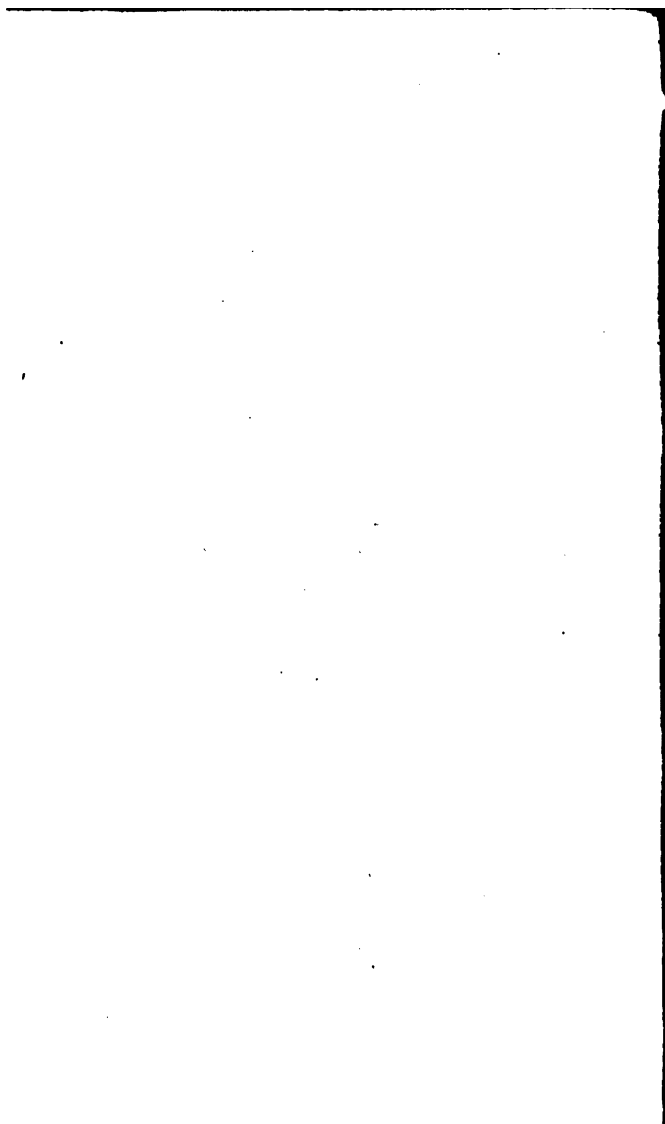
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PRINCIPLES
OF THE
LAW OF INSURANCE.



PRINCIPLES
OF THE
LAW OF INSURANCE

ADOPTED IN THE
CIVIL CODE OF THE STATE OF CALIFORNIA.

With Notes and References to Adjudged Cases

BY
WILLIAM BARBER.

SAN FRANCISCO:
SUMNER WHITNEY & CO.
1882.

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BACON & COMPANY, PRINTERS.

PREFACE.

THE Civil Code of California has been in operation since the first day of January, 1873. It is based on, and to a great extent copied from, the proposed Civil Code of the State of New York, which was prepared by a commission appointed by the Legislature of that State, and completed and published in the year 1865. It has not, however, been yet adopted as a part of the statutory law of the State; but, from present indications, its adoption at no very distant period may be reasonably expected.

The title "Insurance" in each of these Codes includes substantially the same provisions. The present publication contains the text of that title as it appears in the Civil Code of California, with references to the corresponding passages in the Civil Code of the State of New York. To this text, which furnishes, with some modifications, an outline of the common law of insurance, numerous annotations have been appended. In these an attempt has been made to compare the law of the Code with the pre-existing law; to indicate, by the citation of adjudged cases and recognized authorities, the construction of many of the provisions of the former; and, by supplying numerous details in respect to which the Code is silent, to present within a small compass a concise view of the principal heads of the Law of Insurance.

SAN FRANCISCO, June, 1882.

THE following editions of treatises are referred to in this volume:

Marshall on Insurance, 1st Am. ed., 1805.

Shee's Marshall on Insurance, 5th ed., 1865.

Park on Insurance, 6th ed., 1809.

Arnould on Insurance, 2nd ed., 1850.

McLachlan's Arnould on Insurance, 4th ed., 1872.

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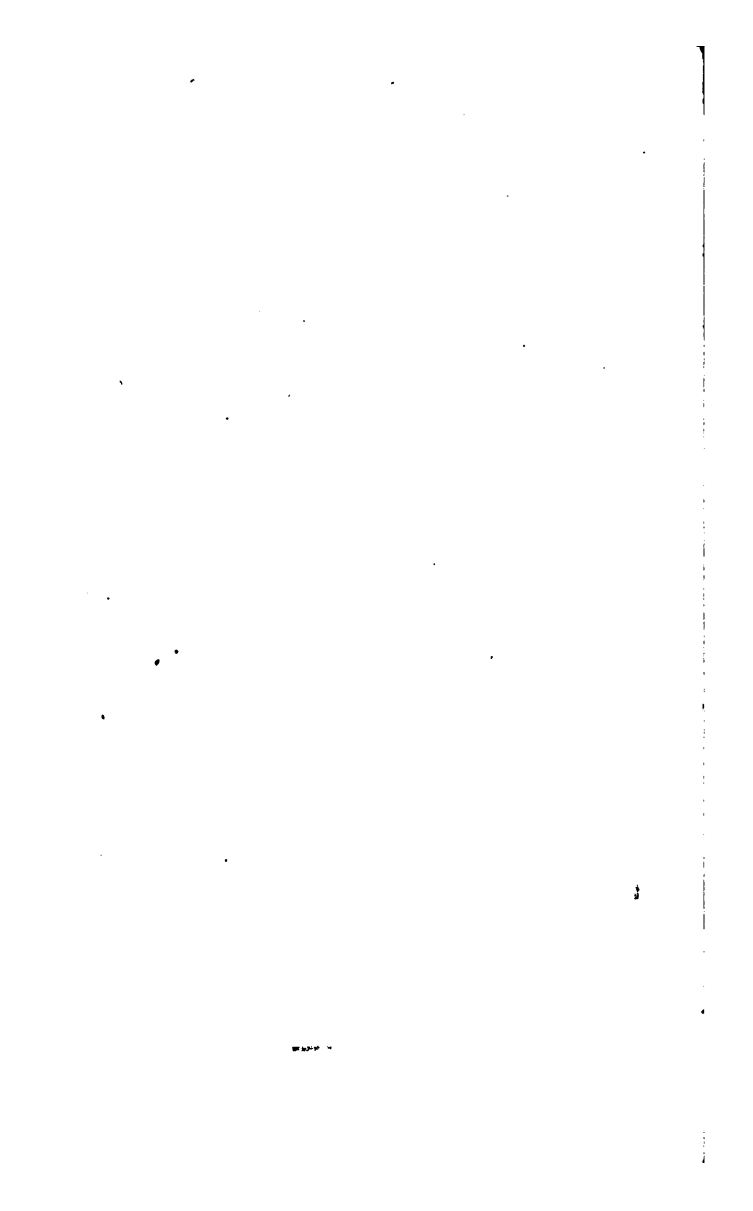
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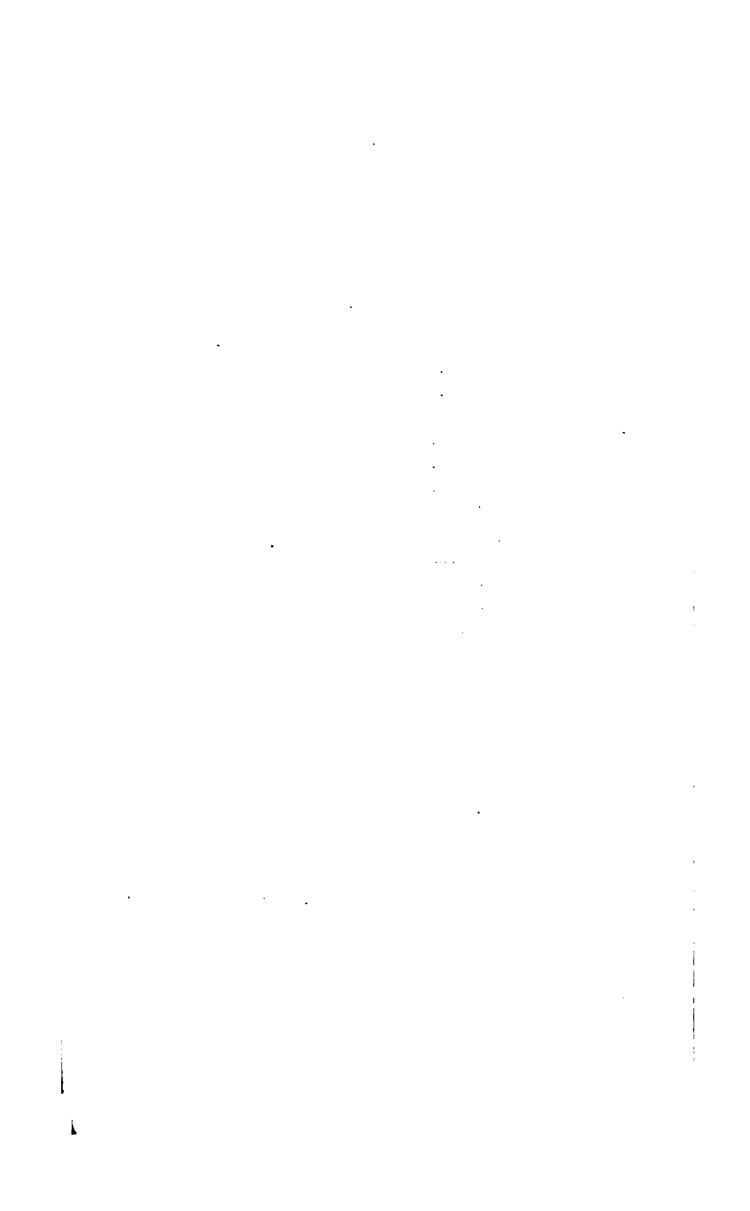
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PRINCIPLES
OF THE
LAW OF INSURANCE.

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PRINCIPLES OF THE LAW OF INSURANCE.

CHAPTER I.

INSURANCE IN GENERAL.

- ARTICLE I. DEFINITION OF INSURANCE, § 1
- II. WHAT MAY BE INSURED, §§ 2-5.
- III. PARTIES, §§ 6-10.
- IV. INSURABLE INTEREST, §§ 11-23.
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- X. NOTICE OF LOSS, §§ 82-86.
- XI. DOUBLE INSURANCE, §§ 87, 88.
- XII. REINSURANCE, §§ 89-92.

ARTICLE I.

DEFINITION OF INSURANCE.

§ 1. Insurance, what.

§ 1. *Insurance is a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from an unknown or contingent event.*

Civ. Code Cal. 2527. N. Y. Civ. Code, 1357.

A contract of insurance may provide for indemnity against past losses, which, at the date of the agreement, are unknown to both parties, as in the case of a marine policy insuring a ship, "lost or not lost," from a date anterior to the making of the policy. Nor is it necessary

that the party insured should in such case have acquired any interest in the insured property anterior to the loss. (*Sutherland v. Pratt*, 11 Mees. & W. 296.)

It is not necessary that the policy should contain the words "lost or not lost," in order to cover losses anterior to its date, if such was the intention of the parties. (*Hammond v. Allen*, 2 Sum. 396; 3 Kent Com. *259, note c; *Folsom v. Mercantile Ins. Co.* 8 Blatchf. 170; 18 Wall. 237; *Security F. Ins. Co. v. Kentucky M. & F. Ins. Co.* 7 Bush, 81; *Hooper v. Robinson*, 8 Otto, 537.)

Article 365 of the Code de Commerce provides, "that every insurance made after the loss or arrival of the property insured is void, if it may be presumed that, before the signing of the policy, the insured might have been informed of the loss, or the insurer of the arrival of the subject of the insurance."

Article 366 is as follows: "The presumption arises (independently of other proof), if, by reckoning three-quarters of a myriametre,* per hour, without prejudice to other proofs, it is established that, from the place of arrival or loss of the vessel, or from the place whence the first news of either has arrived, advice might have been brought to the place where the contract of insurance was entered into, before signing the same." (See also Civ. Code, art. 1352.)

In practice, the presumption is, that the parties to the contract of insurance have received information of all news concerning the ship insured that may at the time of the contract have arrived at the places where they are, even if addressed to third parties unknown to them. In order to avoid the results of this presumption, it is frequently the custom to insert in the policy a clause by which the insurance is made "on good or bad news" (*sur bonnes ou mauvaises nouvelles*), equivalent to "lost or not lost." The effect of this is, that the policy can be annulled only on proof that the underwriter was aware of

* A myriametre is about 6.940 English miles.

the arrival of the ship, or the insured of her loss, prior to the consummation of the contract. (Goirand's Code de Commerce, 322, 324; Code de Commerce, art. 367; Meredith's Emerigon, ch. 15, § 5; id. § 3.

ARTICLE II.

WHAT MAY BE INSURED.

- § 2. What events may be insured against.
- § 3. Insurance of lottery or lottery prize unauthorized.
- § 4. Usual kinds of insurance.
- § 5. All subject to this chapter.

§ 2. *Any contingent or unknown event, whether past or future, which may damnify a person having an insurable interest, or create a liability against him, may be insured against, subject to the provisions of this chapter.*

Civ. Code Cal. 2531. N. Y. Civ. Code, 1358.

§ 3. *The preceding section does not authorize an insurance for or against the drawing of any lottery, or for or against any chance or ticket in a lottery drawing a prize.*

Civ. Code Cal. 2532.

§ 4. *The most usual kinds of insurance are—*

1. *Marine insurance;*
2. *Fire insurance;*
3. *Life insurance;*
4. *Health insurance; and*
5. *Accident insurance.*

Civ. Code Cal. 2533. See N. Y. Civ. Code, 1359.

§ 5. *All kinds of insurance are subject to the provisions of this chapter.*

Civ. Code Cal. 2534. N. Y. Civ. Code, 1360.

ARTICLE III.

PARTIES TO THE CONTRACT.

- § 6. Designation of parties.
- § 7. Who may insure.
- § 8. Who may be insured.
- § 9. Assignment to mortgagee of thing insured.
- § 10. New contract between insurer and assignee.

§ 6. *The person who undertakes to indemnify another by a contract of insurance is called the insurer, and the person indemnified is called the insured.*

Civ. Code Cal. 2538. N. Y. Civ. Code, 1361.

§ 7. *Any one capable of making a contract may be an insurer, subject to the restrictions imposed by special statutes upon foreign corporations, non-residents, and others.*

Civ. Code Cal. 2539. N. Y. Civ. Code, 1362.

§ 8. *Any one, except a public enemy, may be insured.*

Civ. Code Cal. 2540. N. Y. Civ. Code, 1363.

"A public enemy."—This term appears to be synonymous, in the law of insurance, with that of "alien enemy." An alien enemy, in the primary signification of the term, is the natural-born subject of a State actually engaged in war with our own; but the principle is now fully established, that, for all commercial purposes, the domicile of the party, without reference to his place of birth, is the leading test of national character. Every person domiciled in a State actually engaged in hostilities with our own is, for all commercial purposes, an alien enemy, whether he be a born subject of that State or not. (The Indian Chief, 3 Rob. Adm. 18.) The same principle, that, for all commercial purposes, the domicile of the party during a state of war determines his status as friendly, hostile, or neutral, has been repeatedly and explicitly admitted in the courts of the United States. (1 Kent Com. 75.)

An insurance effected in England, in behalf of an alien enemy, though made previously to the commencement of

hostilities, and therefore legal in its origin, does not cover a loss by British capture. (*Furtado v. Rodgers*, 3 Bos. & P. 191.) This decision rests on the obvious impolicy of allowing a subject of one belligerent power to protect the property of a subject of the other belligerent power from the effects of the hostilities of the former. (See *Prize Cases*, 2 Black, 635, 671-674.)

Effect of war upon life policies.—On the principle, that during a state of war any act or contract which tends to increase the resources of the enemy, and every kind of trading or commercial dealing or intercourse with him, is unlawful (*Kershaw v. Kelsey*, 100 Mass. 572), an insurance effected *flagrante bello* on the life of an enemy, subject, or citizen, would seem to be void. (See *Cohen v. N. Y. Mutual Ins. Co.* 50 N. Y. 618.)

Suspension of payment of premiums by war.—

As to the effect of such suspension on the forfeiture of the policy, the authorities are at variance. Thus in the case just cited, the insurance company issued, in New York, to Cohen's wife, in 1849, a policy on Cohen's life. The premiums were duly paid until April, 1862. Being a resident of Georgia, she was prevented by the Civil War from making the payments due in New York in April, 1862, 1863, and 1864, though ready and willing to do so. As soon as communication was re-established between the North and South, she tendered all the premiums due; but the company refused to receive them, and declared the policy forfeited. She thereupon filed a bill in equity, in the Superior Court of the city of New York, praying that she might be permitted to make payment of these premiums, and that her policy might be declared valid, or that the defendant should refund all sums paid on the policy, with interest and all dividends thereon, and for other relief. The Court of Appeals (*Cohen v. N. Y. M. I. Co.* 50 N. Y. 610) held, that the contract of insurance was not dissolved by the war. That the remedy thereon was suspended during war, and revived with the return of

peace. That the occurrence of war between two States forbids and prevents the transmission of money, for payment of the premiums, from the one State to the other, and legally excuses non-payment. That the condition forfeiting the policy for non-payment of premiums as they fall due is suspended during war; and a tender, after its termination, of the premiums unpaid, with interest on each from the time it fell due, revives the policy. (See *contra*, as to the latter point, *Dillard v. Manhattan L. Ins. Co.* 44 Geo. 119; *O'Reily v. Mutual L. I. Co.* 2 Abb. Pr. N. S. 167; *Worthington v. Charter Oak Ins. Co.* 41 Conn. 372.)

In *Sands v. N. Y. Life Ins. Co.* 50 N. Y. 626, it was held, that a life policy, issued prior to the commencement of the Civil War to a resident of Alabama, who continued to reside there during the war, was not dissolved by the war, as it did not assure against death in the military service of the enemy. The doctrine of *Cohen v. N. Y. Mutual L. I. Co.*, as to the effect of the suspension of payment of premium by war, was also affirmed in this case (p. 636).

The Supreme Court of the United States, in the case of *The N. Y. L. I. Co. v. Statham*, and two other similar cases (3 Otto, 24), decided that, by a failure to pay the annual premium on a life policy, by reason of the intervention of war between the territories in which the insurer and the insured respectively resided, the policy is forfeited, if by its terms the non-payment of the annual premium avoids the insurance. But that in such case the assured is entitled to the equitable value of the policy arising from the premiums actually paid; such equitable value being the difference between the cost of a new policy and the present value of the premiums yet to be paid on the forfeited policy when the forfeiture occurred.

The contract of life insurance, so far as it involves the necessity of the payment of premiums after the commencement of hostilities, is held to be dissolved by war

between the government of the assured and of the assurer in the following cases: *Worthington v. Charter Oak I. Co.* 41 Conn. 372; *Tait v. N. Y. L. I. Co.* 4 Bigelow L. & A. Ins. Rep. 479. The following authorities hold that, in such case, performance is only suspended during the continuance of hostilities: *N. Y. Life Ins. Co. v. Clopton*, 7 Bush, 169; *Robinson v. M. L. I. Co.* 42 N. Y. 54; *Manhattan L. I. Co. v. Warwick*, 20 Gratt. 614; *Cohen v. N. Y. M. L. I. Co.* 50 N. Y. 610; *Sands v. N. Y. L. I. Co.* 59 Barb. 557; 50 N. Y. 626; *Smith v. Charter Oak I. Co.* 5 Bennett L. & A. I. Rep. 217. For additional discussions on the question, see *American Law Review*, vol. 11, p. 221; *Southern Law Review*, vol. 3, p. 387.

§ 9. *When a mortgagor of property effects insurance in his own name, providing that the loss shall be payable to the mortgagee, or assigns a policy of insurance to the mortgagee, the insurance is deemed to be upon the interest of the mortgagor, who does not cease to be a party to the original contract; and any act of his which would otherwise avoid the insurance will have the same effect, although the property is in the hands of the mortgagee.*

Civ. Code Cal. 2541. N. Y. Civ. Code, 1364.

Where a loss is made payable to the mortgagee, the transaction does not operate as an assignment of the policy, but as a substitution of the mortgagee to the rights of the insured against the insurer, after a loss has become due and payable. If by any act or omission of the insured the policy is avoided, it is obvious that nothing can be claimed under it by the mortgagee. (*Grosvenor v. Atlantic Ins. Co.* 17 N. Y. 392; *Buffalo S. E. Works v. Sun M. I. Co.* id. 401; *Springfield F. & M. I. Co.* 43 id. 389; *Hale v. Mechanics' Mut. F. I. Co.* 6 Gray, 172.)

Where by the terms of the policy the loss is made payable to a third party, the general rule in the United States, according to a great preponderance of authority, is that the designated payee may sue on the policy in his

own name. (*Frink v. Hampden*, 31 How. Pr. 30; *Cone v. Niagara F. I. Co.* 60 N. Y. 619, *Luckey v. Gannon*, 37 How. Pr. 138; *Bergsen v. Builders' Ins. Co.* 38 Cal. 544; *Barrett v. Union M. F. Co.* 7 Cush. 175; *Fogg v. Middlesex F. I. Co.* 10 id. 337; *May on Insurance*, §§ 446, 447. *Contra*: *Chamberlain v. New Hampshire F. I. Co.* 5 Bigelow F. I. Cas. 710.)

It seems that the assured also may sue. (*Martin v. Franklin Ins. Co.* 15 Am. L. Reg. 229; *Hand v. Williamsburgh Ins. Co.* 57 N. Y. 41.) See this question discussed, with numerous references to adjudged cases, in an elaborate note to the report of the case of *The Savings Institute v. Com. Ins. Co.* 8 Ins. L. J. 142. But where the strict rules of the common law prevail, an action on a policy under seal, whereby the insured covenants with A, his heirs, executors, administrators, and assigns, to pay the sum insured to B, on the death of A, cannot be maintained by B. (*Flynn v. N. A. Life Ins. Co.* 115 Mass. 449; citing *Sanders v. Filley*, 12 Pick. 554; *Johnson v. Foster*, 12 Met. 167; *Millard v. Baldwin*, 3 Gray, 484; *Northampton v. Elwell*, 4 id. 81; *Dicey on Parties*, 101.)

A loss under a policy of insurance made to the insured (mortgagor) by name, "for whom it concerns, payable to them or order," is subject to set-off of sums due upon the insured's premium notes on other policies, although the policy is made for the benefit of and assigned to a mortgagee of the insured property, if the insurer has no notice of the assignment before the time when the claims are mutually due. (*Commonwealth v. Nat. Ins. Co.* 113 Mass. 514.)

Insurance by mortgagee of his interest. Subrogation of insurer to his rights on payment of loss.—When a mortgagee insures his own interest, and pays his premium as mortgagee, the insurer, on payment of a loss, is entitled to be subrogated, to the extent of the sum paid, to the rights of the mortgagee against the mortgagor. Such, at least, seems to be the general rule.

(*Carpenter v. Prov. W. I. Co.* 16 Peters, 495; *Kernochan v. N. Y. Bowery F. I. Co.* 17 N. Y. 428; *Insurance Co. v. Woodruff*, 2 Dutch. 541; *Springfield F. & M. I. Co. v. Allen*, 43 N. Y. 393; *Ætna F. I. Co. v. Tyler*, 16 Wend. 385; *Honore v. Lamar F. I. Co.* 51 Ill. 409; *Dick v. Franklin F. I. Co.* 10 Ins. Law J. 468. *Contra*: *King v. State M. I. Co.* 7 Cush. 1; *Suffolk F. I. Co. v. Boyden*, 9 Allen, 123; *Benjamin v. Saratoga M. F. I. Co.* 17 N. Y. 415; *Phill. Ins.* §§ 1511, 1712; *Concord U. M. F. I. Co. v. Woodbury*, 45 Me. 447, *dub.*) See this question discussed 2 Am. Lead. Cas. 5th ed. 825-830, note to *Lazarus v. Commonwealth Ins. Co.*; also *Wood's Fire Ins. ch. 16*. But where the mortgagor pays the premium and effects the insurance for his own security, although the loss may be payable to the mortgagee, the right of subrogation in favor of the insurer does not exist, as the mortgagor is in such case entitled to a credit on the mortgage debt for the amount of the loss paid under the policy to the mortgagee. (*Kernochan v. N. Y. Bowery F. I. Co.* 17 N. Y. 441; *Springfield F. & M. I. Co. v. Allen*, 43 N. Y. 389.)

When a mortgagor, for the purpose of additional security to the mortgagee, pays the premium on a fire policy issued to the latter on the mortgaged property, and subsequently discharges the mortgage debt, and the property is afterwards, during the term of the policy, destroyed by fire, the mortgagor is regarded as the person beneficially interested in the policy, and may recover thereon in the name of the mortgagee. The payment of the mortgage debt by the mortgagee is no defense to the insurer. (*Norwich F. I. Co. v. Boomer*, 52 Ill. 442.)

Where the interest of the mortgagee is insured, or a policy issued to the mortgagor is made payable, in case of loss, to the mortgagee, the insurer's right of subrogation is frequently provided for by an express stipulation in the policy. (See *Davis v. Quincy M. F. I. Co.* 10 Gray, 113; *Springfield F. & M. I. Co. v. Allen*, 43 N. Y. 389; *Foster v. Van Reed*, 70 id. 20.)

In *Mercantile M. I. Co. v. Clark*, 118 Mass. 288, the mortgagee of a vessel recovered judgment against the insurers for a total loss through a barratrous sale by the master, and afterwards recovered judgment against the purchaser claiming under such barratrous sale for the conversion of the vessel. Both judgments were satisfied. It was held that the insurers were entitled to be subrogated to the rights of the mortgagee in respect to the damages recovered by him for the injury to his interest in the property. This was on the principle, that where a loss on insured property is caused by the tort of a third party, the insurer on paying the loss is entitled to be subrogated to the rights of the assured as against the tortfeasor. (See *contra*: *Carroll v. N. O. J. and G. N. R. Co.* 26 La. An. 447; 5 Bennett's F. I. Cas. 553.)

Mere beneficiary cannot sue.—When the promise of the insurer in a policy is to the insured, his executors, administrators, or assigns, an action on it cannot be maintained at common law in the name of one for whose benefit it is expressed to be made. (*Bailey v. N. E. M. L. I. Co.* 114 Mass. 177.)

But an assignee of the insured may, in such case, maintain an action as trustee of an express trust, for the use and benefit of the beneficiary. (*Gould v. Emerson*, 99 Mass. 154; *Burroughs v. State Ass. Co.* 97 id. 359.)

§ 10. *If an insurer assents to the transfer of an insurance from a mortgagor to a mortgagee, and at the time of his assent imposes further obligations on the assignee, making a new contract with him, the act of the mortgagor cannot affect his rights.*

Civ. Code Cal. 2542. N. Y. Civ. Code, 1365.

This section seems to be based on the decision in *Foster v. Equitable M. F. I. Co.* 2 Gray, 216, in which it was held, that an assignment of a policy issued by a mutual fire insurance company, made with the assent of the insurers, to a mortgagee of the property insured, on his

giving a written promise to pay all future assessments on the policy, and agreeing that the property should continue subject to the same lien for the payment of assessments as before, constitutes a new contract between the mortgagee and the insurers, which is not affected by the mortgagor's subsequent alienation of the equity of redemption, or by his grantee's obtaining subsequent insurance thereon. In this case, by an arrangement between the assignee (who was also a mortgagee of the insured property) and the insurers, the assignee was virtually substituted in the place of the assignor, in respect to his obligations to the latter. "For a new and independent consideration," says the Court, "the defendants agreed to insure this interest to the plaintiffs, and thereby the parties assumed toward each other the relation of insurer and insured. . . . It was substantially the same as if the policy had been issued to the plaintiffs as mortgagees, and such, we think, is the legal effect intended to be given to policies in the hands of assignees by the seventh section of the act incorporating the defendants, by which it is provided that alienation of property insured should avoid the policy unless the purchaser having the policy assigned to him should have it confirmed for his benefit; in which case the assignee shall be liable to the conditions of the original insured, and will be required to guarantee payment of the deposit note. This is manifestly intended to create a new contract of insurance between the assignee and the company, upon the basis of the original application and policy. It substitutes a new party in place of the original assured, and for a new consideration agrees to protect his interest in the property covered by the policy."

The language of § 10, compared with the terms of this decision, seems deficient in precision. To the extent to which any additional obligation is imposed on the assignee, the contract is "a new contract with him." But if it is requisite, in order to relieve the mortgagee or assignee from responsibility for the acts of the mortgagor

or assignor, not only that this additional obligation should be imposed, but that a new contract should be made with him, by which, as between him and the insurers, he shall virtually occupy toward them the place of the mortgagor or assignor, more appropriate language than that contained in § 10 might have been selected to express this meaning.

In *Edes v. Hamilton M. Ins. Co.* 3 Allen, 362, the Court remarked, in respect to *Foster v. Equitable Ins. Co.*, just cited, that "the decision in that case, although fully warranted by the peculiar facts which were there shown to exist, was nevertheless going as far as the rules of law will permit in order to sustain a claim for loss under a policy which has been assigned by the original assured."

ARTICLE IV.

INSURABLE INTEREST.

- § 11. Insurable interest, what.
- § 12. In what may consist.
- § 13. Interest of carrier or depositary.
- § 14. Mere expectancies.
- § 15. Measure of interest in property.
- § 16. Insurance without interest illegal.
- § 17. When interest must exist.
- § 18. Effect of transfer.
- § 19. Transfer after loss.
- § 20. Exception in the case of several subjects in one policy.
- § 21. In case of the death of the insurer.
- § 22. In the case of transfer between co-tenants.
- § 23. Policy, when void.

§ 11. *Every interest in property, or any relation thereto, or liability in respect thereof, of such a nature that a contemplated peril might directly damnify the insured, is an insurable interest.*

Civ. Code Cal. 2546. N. Y. Civ. Code, 1366.

Thus a creditor may insure the life of his debtor, a carrier may insure the property intrusted to his care, a tenant,

pour autre vie, may insure the life on the duration of which his estate depends.

Mr. Arnould (1 Ins. *229) cites the judgment of Lawrence, J., in *Lucena v. Crawford*, 1 Bos. & P. N. R. 269, as containing a clear and comprehensive definition of what constitutes an insurable interest. The passage referred to is as follows: "A man is interested in a thing, to whom advantage may arise or prejudice happen from the circumstances which may attend it, and whom it importeth that its condition as to safety or other quality should continue. Interest does not necessarily imply a right to a whole or part of the thing, nor necessarily and exclusively that which may be the subject of privation, but the having some relation to, or concern in, the subject of the insurance; which relation or concern, by the happening of the perils insured against, may be so affected as to produce a damage, detriment, or prejudice to the party insuring. And where a man is so circumstanced with respect to matters exposed to certain risks and dangers as to have a moral certainty of advantage or benefit but for those risks and dangers, he may be said to be interested in the safety of the thing. To be interested in the preservation of a thing is to be so circumstanced in respect to it as to have benefit from its existence, prejudice from its destruction. The property of the thing, and the interest derivable from it, may be very different. Of the first, the price is generally the measure; but by interest in a thing, every benefit and advantage arising out of or depending on such thing may be considered as being comprehended." (See also, *Warren v. Davenport F. I. Co.* 31 Iowa, 464; *Buck v. Chesapeake Ins. Co.* 1 Peters, 151 (163); *Herkimer v. Rice*, 27 N. Y. 163.)

For numerous illustrations of the legal signification of the term "insurable interest," see *Lazarus v. Commonwealth Ins. Co.* 19 Pick. 81-98; and the learned dissertation annexed to the report of that case in 2 Amer. Leading Cases, 5th ed. 806; Wood on Fire Insurance, chapter 8;

May on Insurance, §§ 76-117; Parsons on Marine Insurance, vol. 1, pp. 155-236; Shee's Marshall on Marine Insurance, pp. 65-84; 3 Kent's Com *262-278.)

In the case of *Anderson v. Morice*, Law R. 10 Com. P. 58, 109, 1 App. Cas. 713, A., a merchant in London, entered into a contract as follows:

"Bought of B. S. & Co. the cargo of the new crop Rangoon rice, per Sunbeam, 707 tons register, at 9s. 1½d. per cwt., cost and freight. Payment by seller's draft on purchaser, at six months' sight, with documents attached."

A. insured the cargo "at and from Rangoon." While the ship (which had been chartered to A.) was loading at Rangoon, and when most of the cargo of rice was already laden, and the rest alongside the vessel, she unexpectedly sunk, and became, with the cargo on board, a total loss. The master, however, signed and delivered bills of lading for the cargo actually laden, and A. accepted the seller's drafts, and paid them after notice of the loss.

Suit being brought by A. on his policy, the underwriters declined to pay, alleging that he had no insurable interest in the rice shipped on the vessel. The principal point of contention was, whether A. acquired, under the contract above set forth, any proprietary interest in the rice until the entire cargo was shipped. Judgment was given in the Common Pleas in favor of the plaintiff, but on appeal to the Exchequer Chamber, it was reversed. The case finally went to the House of Lords, where the opinions of the members of the Court were equally divided, leaving the judgment of the Exchequer Chamber to stand as the law of the case. (See, sustaining the same principle, *Box v. Provincial Ins. Co.* 5 Bennett's F. I. Cas. 197; *Ebsworth v. Alliance Ins. Co.* Law R. 8 Com. P. 596. See also, *Joyce v. Swan*, 17 C. B. N. S. 84.)

In *Seagrave v. Union M. I. Co.* Law R. 1 Com. P. 305, it was held, that the evidence showed that a contract of sale had been effected, by which the title of the vendor had been divested, and consequently, that a policy of insur-

ance subsequently obtained by him on the property sold was void for want of interest to sustain it.

Specific lien not necessary.—Although a creditor at large, having no specific lien on the property of his debtor, is usually considered as having no insurable interest therein, yet it would seem that if he has a right which may be enforced against the property, and which is so connected with it that injury thereto will necessarily result in a loss to him, he has an insurable interest therein. Thus in *Rohrbach v. The Germania F. I. Co.* 62 N. Y. 47, Rohrbach, the plaintiff, prior to his marriage, had been in the employ of the woman who subsequently became his wife, and who was at the time of marriage indebted to him for work and services. After marriage, she executed to him an instrument acknowledging her indebtedness, and stating that it should be a lien on her property. On her death, her personal property was found insufficient to pay her other debts, and she left but one piece of real estate, which was principally valuable for the buildings thereon. After her death, her husband insured the buildings. In an action on the policy, the insurer pleaded that the husband had no insurable interest in the property. The Court of Appeals, after an elaborate examination of the question, decided that he had an equitable interest in the property, which would support the policy of insurance thereon.

The Court (Folger, J.) remarked: "Though the instrument contains the phrase 'shall be a lien on my property,' no specific lien was thereby created, and so far as that instrument had effect, no more than a general equitable lien, yet to be enforced, and made specific by a judgment in an equitable action. . . . His (plaintiff's) position was not so good in some respects as that of a judgment creditor, but it was not unlike it: both had a right to have the real estate sold for the payment of their debts. For a certain space of time, it could not escape the exercise of that right, and it cannot be said that the

interest of a judgment creditor in the real estate, as an interest in the property, was greater or nearer than that of the plaintiff. It was more manageable, but not more direct in the end. . . . Here the debtor was dead. There was no longer any personal liability; nor sufficient personal property to satisfy the debt; nor, as may be inferred, any other real estate than that insured. A fund for the payment of the debt was to be found only in this estate, and principally in the buildings insured. By force of these circumstances, and by operation of the statutes above referred to (certain sections of the N. Y. Revised Statutes), this real estate was, for a certain length of time, bound for the payment of this debt. As it was bound, as it alone was bound, as there was nought else nor any person liable for the debt, it is difficult to see why, in effect, the debt was not as if a specific lien upon this real estate. A lien, in its most extensive signification, is a charge upon property for the payment or discharge of a debt or duty. A specific lien is a charge upon a particular piece of property, by which it is held for the payment or discharge of a particular debt or duty in priority to the general debts or duties of the owner. It is not the name of the right which gives or refuses an insurable interest: it is the character of the right. A specific lien gives an insurable interest, because a loss of the specific property is at once seen to affect disastrously the specific lienor. But when a right to payment of a debt exists, which can be satisfied only from a particular piece of property, is there not the same result from the same cause? If I have a debt against another, and he has but one piece of real estate from which my debt may be made, and he dies leaving no personal estate, though in technical language my lien may not be specific upon that real estate, it is true, in fact, that there is a specific piece of property from which alone I may hope to satisfy my lien, and which is alone legally bound to satisfy it; and I am practically just like one to whom that piece of real

property has been specifically pledged for a specific debt. If the latter, for that he may suffer pecuniary loss by the burning of that real property, has such an interest that he may insure against that burning, I have such an interest also, and I, too, may insure. The probability—nay, the possibility—of the payment of the plaintiff's debt out of the property of the deceased debtor rested entirely upon the contingency of this real estate remaining without serious impairment in value."

Corporate interests.—It is held that the owner of stock in a corporation organized for pecuniary profit has an insurable interest in the corporate property. (*Warren v. Davenport* F. I. Co. 31 Iowa, 464.)

But stockholders in a corporation, even though they own the entire stock, cannot insure the property of the corporation in their own names as belonging to them. (*Phillips v. Knox Co.* M. I. Co. 20 Ohio, 174. See *Regina v. Arnaud*, Law R. 9 Q. B. 806; and *Wilson v. Jones*, Law R. 1 Ex. 193; 2 id. 139.)

Parol contracts.—One who has entered into an oral contract for the purchase of a vessel, acquires thereby an insurable interest in her, notwithstanding the statute of frauds, in all cases where the effect of the statute is not to annul such a contract, but to preclude any legal remedy in case it should be violated. (*Amsinck v. Am.* I. Co. 129 Mass. 128.)

§ 12. *An insurable interest in property may consist in—*

1. *An existing interest;*
2. *An inchoate interest founded on an existing interest; or,*
3. *An expectancy coupled with an existing interest in that out of which the expectancy arises.*

Civ. Code Cal. 2547. N. Y. Civ. Code, 1367.

Under the first subdivision of this section may be ranked actual present title to the property.

Under the second, a ship-owner's right to freight on goods in transit laden on board his ship.

Under the third, expected profits on goods consigned to a factor for sale.

§ 13. *A carrier or depositary of any kind has an insurable interest in a thing held by him as such to the extent of its value.*

Civ. Code Cal. 2548. N. Y. Civ. Code, 1368.

Because injury to that extent might result to him from its loss. (*Crowley v. Cohen*, 3 Barn. & Adol. 478; *De Forest v. Fulton*, 1 Hall, 84; *Van Natta v. Mutual Sec'y Ins. Co.* 2 Sand. 490. See *Ebsworth v. Alliance Ins. Co.* Law R. 8 Com. P. 609; *Stilwell v. Staples*, 19 N. Y. 401.)

§ 14. *A mere contingent or expectant interest in anything, not founded on an actual right to the thing, nor upon any valid contract for it, is not insurable.*

Civ. Code Cal. 2549. N. Y. Civ. Code, 1369.

Carroll v. Boston M. I. Co. 8 Mass. 515; *Knox v. Wood*, 1 Camp. 542; *Stockdale v. Dunlop*, 6 Mees. & W. 224; *Box v. Provincial Ins. Co.* 5 Bennett's F. I. Cas. 197.

§ 15. *The measure of an insurable interest in property is the extent to which the insured might be damnified by loss or injury thereof.*

Civ. Code Cal. 2550. N. Y. Civ. Code, 1370.

That is to say, any person having an insurable interest in property may insure himself against injury to or loss of the same to the extent of such interest.

§ 16. *The sole object of insurance is the indemnity of the insured, and if he has no insurable interest, the contract is void.*

Civ. Code Cal. 2551. N. Y. Civ. Code, 1371.

§ 17. *An interest insured must exist when the insurance takes effect and when the loss occurs, but need not exist in the mean time.*

Civ. Code Cal. 2552. N. Y. Civ. Code, 1372.

If the policy contains no condition against the alienation

of the insured property, the assured may alienate it during the continuance of the policy without avoiding the insurance; and if the title to the property is afterwards revested in the assured, and is held by him at the time of the loss, his rights are not affected by the temporary alienation. (*Worthington v. Bearse*, 12 Allen, 382; *Power v. Ocean Ins. Co.* 19 La. 28; *Laine v. Maine M. F. I. Co.* 3 Fairf. 44.)

But if a loss occurs during the period of such alienation, no recovery can be had on the policy. (*Wilson v. Hill*, 3 Met. 66; *Fogg v. Middlesex Ins. Co.* 10 Cush. 337, 345.)

The condition against alienation and other like conditions, usually found in fire policies, avoiding the policy in case of a change of the title or interest of the assured, are construed strictly in favor of the assured. (*Hoffman v. Aetna F. I. Co.* 32 N. Y. 405; *Westfall v. Hudson R. F. I. Co.* 2 Duer, 490; *West Branch Ins. Co. v. Halfstein*, 40 Pa. St. 289; *Ayres v. Home Ins. Co.* 21 Iowa, 185; *Gordon v. Mass. Ins. Co.* 2 Pick. 249; *Lazarus v. Commonwealth Ins. Co.* 19 id. 81.)

The condition against "alienation" is commonly held to refer only to an entire and absolute divestiture of all interest of the assured in the property; and if at the time of the loss any interest whatever remains in the assured, it is protected by the policy. (*Jackson v. Mass. Ins. Co.* 23 Pick. 418; *Van Deuzen v. Charter Oak Ins. Co.* 1 Rob. (N. Y.) 55; *Cowan v. Iowa State. Ins. Co.* 40 Iowa, 551; *Hitchcock v. Northwestern Ins. Co.* 26 N. Y. 68; *Kitts v. Massasoit Ins. Co.* 56 Barb. 177.)

§ 18. *Except in the cases specified in the next four sections, and in the cases of life, accident, and health insurance, a change of interest in any part of a thing insured, unaccompanied by a corresponding change of interest in the insurance, suspends the insurance to an equivalent extent until the interest in the thing and the interest in the insurance are vested in the same person.*

Civ. Code Cal. 2553. See N. Y. Civ. Code, 1373.

See *Worthington v. Bearnse*, 12 Allen, 382; *Lane v. Maine M. F. I. Co.* 12 Me. 44; *Hooper v. Hudson River F. I. Co.* 16 Barb. 413, 415; 17 N. Y. 424-426.

But if the policy contains a condition that any transfer or change of title, or alienation of the property, or any part thereof, shall avoid the policy, a violation of such condition will terminate the insurance. (*Adams v. Rockingham M. I. Co.* 29 Me. 292; *Abbott v. Hampden Ins. Co.* 30 id. 414; *Clark v. New England M. I. Co.* 6 Cush. 342; *McLaren v. Hartford F. I. Co.* 1 Seld. 151; *Ætna Ins. Co. v. Tyler*, 16 Wend. 385; *Dreher v. Ætna Ins. Co.* 18 Mo. 128; *Loring v. Manufacturers Ins. Co.* 8 Gray, 28; *Finley v. Lycoming Ins. Co.* 30 Pa. St. 311; *Barnes v. Union M. I. Co.* 51 Me. 110; *Buckley v. Garrett*, 47 Pa. St. 404; *Ayres v. Hartford F. I. Co.* 17 Iowa, 176; *Home Ins. Co. v. Hauslein*, 60 Ill. 521.)

Fire policies usually contain a condition that neither the insured property nor the policy shall be transferred or assigned without the consent of the insurer, and that a violation of either term of this condition shall avoid the policy. (See *Smith v. Saratoga Ins. Co.* 1 Hill, 497.) Where the insurance is on a stock of goods intended for sale, the condition against a sale or transfer of the insured property does not apply. (*Hooper v. Hudson River R. R. Co.* 17 N. Y. 424; *Wolfe v. Security F. I. Co.* 39 id. 49; *Lane v. Mutual F. I. Co.* 12 Me. 44.)

Marine policies are ordinarily assignable like other choses in action; but in order to render the assignment effectual as a protection to the insured property, a corresponding interest in such property must be assigned to the assignee of the policy. (1 Arnould Ins. 232; 1 Phill. Ins. § 76, 87; 2 Am. Leading Cases, 5th ed. 847; note to *Lazarus v. Commonwealth Ins. Co.* 19 Pick. 81.)

§ 19. *A change of interest in a thing insured, after the occurrence of an injury which results in a loss, does not affect the right of the insured to indemnity for the loss.*

Civ. Code Cal. 2554. N. Y. Civ. Code, 1374.

When the loss is so great as to exhaust the policy, a transfer of the property after the loss will not affect the rights of the insured under his policy. (*Mellen v. Hamilton F. I. Co.* 17 N. Y. 609.) But where the loss is only partial, still leaving aliment for the policy, a transfer of the property, if prohibited by the terms of the policy, will avoid the insurance in respect to subsequent losses.

§ 20. *A change of interest in one or more of several distinct things, separately insured by one policy, does not avoid the insurance as to the others.*

Civ. Code Cal. 2555. N. Y. Civ. Code, 1375.

See *Clark v. N. E. M. F. I. Co.* 6 Cush. 342; *Com. Ins. Co. v. Spankneble*, 52 Ill. 53; *Hartford F. I. Co. v. Walsh*, 54 id. 164; *Loehner v. Home Ins. Co.* 17 Mo. 247; id. 628; *Koontz v. Hannibal Savings F. I. Co.* 42 id. 126; *Date v. Ins. Co.* 14 Up. Can. C. P. 548; *Trench v. Chenango M. I. Co.* 7 Hill, 122; 25 Alb. L. J. 224.

But where the insurance is for a gross amount, distributed in various sums on various corresponding articles, for one gross premium, are such articles "separately insured," within the meaning of this section? (See *Platt v. Minnesota F. Ins. Co.* 23 Minn. 479.)

In this case, the policy contained a condition, that if the assured should mortgage the property without notifying the secretary, he should not be entitled to recover on the policy.

One of the insured articles, valued at \$500, was mortgaged without notifying the secretary, and the insurer insisted that all right of recovery on the policy was thereby barred.

The opinion of the Court contains the following passage:

"The policy declared on in this case shows that the consideration paid therefor by plaintiff was single and entire. The amount of insurance secured thereby was the gross sum of \$1,150, distributed upon several items of property, as therein specifically stated. It is well settled,

by a uniform current of authority, that a contract of insurance of this character is an entirety, and indivisible, the sole effect of the apportionment of the amount of insurance upon the separate and distinct items of property named in the policy being to limit the extent of the insurer's risk, as to each item, to the sum so specified. (2 Parson's Cont. 5th ed. 519; *Gottzman v. Penn. Ins. Co.* 56 Pa. St. 210; *Friesmuth v. Agawam M. F. I. Co.* 10 Cush. 587; *Brown v. People's M. I. Co.* 11 id. 280; *Lee v. Howard Fire Ins. Co.* 3 Gray, 583; *Kimball v. Howard F. I. Co.* 8 id. 33; *Lovejoy v. Augusta M. F. I. Co.* 45 Me. 472; *Richardson v. Maine Ins. Co.* 46 id. 394; *Gould v. York M. F. I. Co.* 47 id. 403; *Barnes v. Union M. F. I. Co.* 51 id. 110; *Day v. Charter Oak F. & M. I. Co.* 51 id. 91.)"

This decision is not entirely in accordance with the cases first above cited and with the principle of § 20. (See also *Pierce v. Columbian Ins. Co.* 14 Allen, 320, and cases cited; *Manley v. Insurance Co. of North America*, 1 Lans. 20; 3 Kent's Com. *329, 330.)

This question is discussed at length in the case of *Merrill v. Agricultural Ins. Co.* 73 N. Y. 459-468, in which the conclusion is arrived at, that where, by a policy upon separate and distinct classes or species of property, each of which is separately valued, the sum total of the valuation is insured on payment of a premium in gross, the contract is severable, and a breach of a condition avoiding the policy as to one of the items does not affect the others; at least, where there is nothing in the terms, in the nature of the contract, or of the different subjects of the insurance, or in the surrounding circumstances, from which it can be inferred that the insurer would not have been likely to have assumed the risk on one or several of the subjects of insurance, unless induced by the profit or advantage of having a risk upon all.

• But where the breach of the condition as to one item exposes the other items to a risk which the insurer did not contemplate, and to which he cannot be presumed to

have assented, such breach will, it seems, vitiate the entire policy. (See *Baldwin v. Hartford F. I. Co.* 10 Ins. Law. J. 433, New Hampshire Sup. Ct.; *Schumitsch v. Russian Ins. Co.* 9 Ins. Law J. 60, and the learned editorial note thereon.

§ 21. *A change of interest, by will or succession, on the death of the insured, does not avoid an insurance, and his interest in the insurance passes to the person taking his interest in the thing insured.*

Civ. Code Cal. 2556. N. Y. Civ. Code, 1376.

In *Laffin v. Charter Oak Ins. Co.* 58 Barb. 325, it was held, that where, in consequence of the death of the assured during the life of the policy, the title descended to his heirs, this was such a "change of title" within the terms of the policy as terminated the insurance. It may be doubted, however, whether such a change of title, effected neither by the act, omission, or default of the assured, should have been understood as included in the terms of the policy. (*Burbank v. Rockingham Ins. Co.* 4 Fost. (N. H.) 550; *Georgia Home Ins. Co. v. Kinnier's Adm'x*, 28 Gratt. 88. But see *Sherwood v. Agricultural Ins. Co.* 73 N. Y. 447, 450.)

§ 22. *A transfer of interest by one of several partners, joint owners, or owners in common, who are jointly insured, to the others, does not avoid an insurance, even though it has been agreed that the insurance shall cease upon an alienation of the thing insured.*

Civ. Code Cal. 2557. N. Y. Civ. Code, 1377.

This section might well be amended by inserting the words, "or change or transfer of title or interest in," after the words "alienation of." It would then express what, according to a preponderance of authority, is the existing rule of law on the subject to which it refers. (*Pierce v. Nashua F. I. Co.* 50 N. H. 297; *Hoffman v. Ætna Ins. Co.* 32 N. Y. 405; *Buffalo S. E. Works v. Sun Mut. Ins. Co.* 17 id. 412; *Burnett v. Ins. Co.* 46 Ala. 11.)

But where the terms of the policy prohibit the sale or transfer of any undivided interest in the property, it has been held that a sale by one partner to another vitiates the policy. (*Hartford F. I. Co. v. Ross*, 23 Ind. 179. See also, *Dreher v. Ætna Ins. Co.* 18 Mo. 128; *Dix v. Mercantile Ins. Co.* 22 Ill. 272.)

Alienation defined.—The condition against “alienation,” contained in many policies of insurance, has always received a strict construction. In order to enable the insurer to insist on the breach of this condition as a forfeiture of the policy, he must show so absolute a transfer of the property as to divest the assured of all interest therein. (*Van Deuzen v. People’s Ins. Co.* 1 Rob. (N. Y.) 55; *Ayres v. Home Ins. Co.* 21 Iowa, 185; *Orrell v. Hampton F. I. Co.* 13 Gray, 431; *Young v. Eagle F. I. Co.* 14 id. 150.) In 9 Ins. Law J. p. 293, will be found, appended to the report of the case of *Dolliver v. St. Joseph F. & M. I. Co.*, an elaborate note, collating the various authorities on the term “alienation,” and kindred expressions.

Assignment of policy.—Policies of insurance, especially those issued by Fire Insurance Companies, frequently contain a condition that an assignment of the policy, without consent of the insurer, shall render it void. This condition is valid, but is strictly construed against the insurer. (*Lazarus v. Com. Ins. Co.* 5 Pick. 76; *Ferree v. Oxford F. I. Co.* 67 Pa. St. 373; *Waterhouse v. Gloucester*, 69 Me. 409; *Smith v. Saratoga M. F. Ins. Co.* 1 Hill, 497; 3 id. 508.)

§ 23. *Every stipulation in a policy of insurance for the payment of loss whether the person insured has or has not any interest in the property insured, or that the policy shall be received as proof of such interest, and every policy executed by way of gaming or wagering, is void.*

Civ. Code Cal. 2558.

Wager policies.—Although wager policies were good at common law (*Craufurd v. Hunter*, 8 Term Rep. 13;

Jubel v. Church, 2 Johns. Cas. 333), they were with some exceptions prohibited as to British ships, and also as to British cargoes, by the Act of 19 Geo. 2, chap. 37. Soon after this enactment took effect, a question was raised whether an action could be maintained on a policy on *foreign* ships or goods without proof of interest; and after some decisions maintaining the affirmative of this question, it was decided in *Cousins v. Nantes*, in error, in the Exchequer Chamber, in 1811 (3 Taunt. 513), that, in an action on a policy which did not affirmatively appear on its face to be a wager policy, there must be an averment of interest in the plaintiff.

It would seem, therefore, that according to the law of England, wager policies, appearing to be such on their face, were valid as to such English property as was expressly excepted from the operation of the statute of 19 Geo. 2, and as to foreign property, until the passage of the statute of 8 and 9 Victoria, chap. 109, declaring null and void all contracts or agreements by way of gaming or wagering. (But see *Allkins v. Jupe*, L. R. 2 C. P. D. 575.)

In the various States of the United States, policies without interest are held to be illegal; sometimes by statute, sometimes by what is regarded as the common law of the State. (*Amory v. Gilman*, 2 Mass. 1; *Adams v. Pennsylvania Ins. Co.* 1 Rawle, 108; 1 Duer Ins. 95; 1 Phill. Ins. §211; 3 Kent's Com. *278.)

ARTICLE V.

CONCEALMENT AND REPRESENTATIONS.

- § 24. Concealment, what.
- § 25. Effect of concealment.
- § 26. What must be disclosed.
- § 27. Matters which need not be communicated without inquiry.
- § 28. Test of materiality.
- § 29. Matters which each is bound to know.
- § 30. Waiver of communication.
- § 31. Interest of insured.

- § 32. Fraudulent warranty.
- § 33. Matters of opinion.
- § 34. Representation, what.
- § 35. When made.
- § 36. How interpreted.
- § 37. Representation as to future.
- § 38. How may affect policy.
- § 39. When may be withdrawn.
- § 40. Time intended by representation.
- § 41. Representing information.
- § 42. Falsity.
- § 43. Effect of falsity.
- § 44. Materiality.
- § 45. Application of provisions of this article.
- § 46. Right to rescind.

§ 24. *A neglect to communicate that which a party knows and ought to communicate is called a concealment.*

Civ. Code Cal. 2561. N. Y. Civ. Code, 1378.

The expression "a party" includes as well the insurer as the insured. See § 26 (Civ. Code Cal. § 2563); 1 Arnould Ins. *537.

§ 25. *A concealment, whether intentional or unintentional, entitles the injured party to rescind a contract of insurance.*

Civ. Code Cal. 2562. N. Y. Civ. Code, 1379.

"Whether such suppression of the truth arise from the fraud of the assured (that is, from a willful intention to deceive for his own benefit), or merely from mistake, negligence, or accident, the consequences will be the same." (1 Arnould Ins. *536, citing *Carter v. Boehm*, 3 Burr. 1909; *Ratliffe v. Shoolbred*, Marshall on Ins. 464; *Shirley v. Wilkinson*, 1 Doug. 306 n. See also *Carpenter v. American Ins. Co.* 1 Story, 57; 3 Kent's Com. *283.)

It has been held, however, in respect to life policies, that where the applicant omits to disclose information which in his own mind was not material to the risk, such omission will not avoid the policy, if no inquiry was made by the insurer of a nature to elicit such information.

(*Mallory v. Travelers' Ins. Co.* 47 N. Y. 56, and cases there cited.)

§ 26. *Each party to a contract of insurance must communicate to the other, in good faith, all facts within his knowledge which are, or which he believes to be, material to the contract, and which the other has not the means of ascertaining, and as to which he makes no warranty.*

Civ. Code Cal. 2563. N Y. Civ. Code, 1380.

(See *Meredith's Emerigon*, ch. 1, § 5, p. 17; ch. 15, § 3, p. 632.)

"All facts within his knowledge."—But the applicant for insurance must disclose not merely facts of which he has actual knowledge, but such intelligence as he may have received from others, which, if communicated to the insurer, would tend to determine him either to decline the risk, or ask a higher premium for accepting it; and this is the rule, though the intelligence ultimately proves erroneous. (*Da Costa v. Scandaret*, 2 P. Wms. 179; *Durrell v. Bederley*, Holt N. P. 283; *Beckthwaite v. Nalgrove*, id. 288; *Lynch v. Hamilton*, 3 Taunt. 37; *Seaman v. Fonereau*, 2 Strange, 1183; *Willes v. Glover*, 1 Bos. & P. N. R. 14.)

"Which are or which he believes to be material."—But if the fact "which he believes to be material" would have produced no effect whatever on the insurer's mind—if such fact were, indeed, wholly irrelevant to any rational estimate of the risk—why should its concealment entitle the insurer to avoid the contract? (See *Lexington Ins. Co. v. Paver*, 16 Ohio, 324; and note to § 43 (Civ. Code Cal. 2580).)

§ 27. *Neither party to a contract of insurance is bound to communicate information of the matters following, except in answer to the inquiries of the other :*

1. *Those which the other knows ;*
2. *Those which, in the exercise of ordinary care, the other ought to know, and of which the former has no reason to suppose him ignorant ;*

3. *Those of which the other waives communication;*
4. *Those which prove or tend to prove the existence of a risk excluded by a warranty, and which are not otherwise material; and*
5. *Those which relate to a risk excepted from the policy, and which are not otherwise material.*

Civ. Code Cal. 2564. N. Y. Civ. Code, 1381.

1. As to subdivision 1, it is obvious that what a party already knows cannot be concealed from him by the omission of the other party to disclose it.

2. Each party is justified in presuming that the other knows all those facts which, in the exercise of ordinary care, he ought to know; but this presumption ceases as soon as he becomes aware that the other does not possess this knowledge; and in this event, it becomes his duty to communicate it. (2 Duer Ins. 554.)

As the objection of concealment is usually raised by the insurer, most of the reported cases on the subject refer to suits in which that fact has been interposed as a defense to the payment of a loss. The duty of disclosure, however, is equally incumbent on both parties. Thus, if an insurer, having received early private intelligence of a treaty of peace between two belligerents, should accept from a subject of one of them who was ignorant of the treaty a war premium based on the risk of capture by the other belligerent, the premium could be recovered back on the ground of fraud.

In respect to facts which need not be communicated to the underwriter, by reason of the presumption that he knows them, it has been held, that the insured need not mention the general physical phenomena or political probabilities that may affect the risk (*Carter v. Boehm*, 3 Burr. 1905), nor the established usages of trade and navigation (*Noble v. Kennoway*, 1 Doug. 510; *Stewart v. Bell*, 5 Barn. & Adol. 238; *Planché v. Fletcher*, 1 Doug. 238; *Vallance v. Dewar*, 1 Camp. 503; *Hurtin v. Phoenix Ins. Co.* 1 Wash. C. C. 400); nor matters of public notoriety

(*Conlon v. Bowne*, 1 Caines, 288; *Thomson v. Buchanan*, 4 Brown Parl. C. 482); nor matters with which the underwriter, from the nature of his employment and the sources of information open to him, ought to be conversant (*Friere v. Woodhouse*, 1 Holt, 572; *Elton v. Larkins*, 8 Bing. 198); nor the commercial signification of any expression used in the policy (*De Longuemere v. N. Y. F. Ins. Co.* 10 Johns. 120; *Bell v. Marine Ins. Co.* 8 Serg. & R. 98); nor general marine intelligence contained in newspapers taken at the underwriter's office, and which the assured has no reason to suppose unknown to him (*Dickenson v. Comm. Ins. Co.* Anth. 92; *Green v. Merchants' Ins. Co.* 10 Pick. 402, 406; *Himely v. South Carolina Ins. Co.* 3 Const. R. 154); nor items of general news in the public papers of too indefinite a character to show that they have any bearing on the subject-matter of the policy. (*Ruggles v. Gen. Int. Ins. Co.* 4 Mason, 81. See also § 29 (Civ. Code Cal. 2566).)

3. Disclosure need not be made of facts of which communication is waived.

Thus, if the insurance be on a private ship of war from port to port, the underwriter need not be told of the secret enterprises it is destined upon; for, from the nature of the contract, he waives this information. (*Carter v. Boehm*, 3 Burr. 1409.)

When the terms of the policy imply that the vessel may need repairs on her homeward trip from a foreign port, "at and from" which she is insured, the insured need not disclose to the underwriter that the vessel will probably be detained in her port of departure a considerable period for repairs. (*Beckwith v. Sydebotham*, 1 Camp. 116.)

Judge Duer (Ins. vol. 2, p. 522) remarks on this case: "That the law considers an unreasonable delay in the commencement of the voyage insured as a deviation that discharges the underwriter. Hence, as the risk is excluded from the policy, a disclosure of facts tending to

show the probable existence of such a delay is unnecessary. If an unreasonable delay occurs, the policy is void. If the delay, although prolonged and unusual, was under the circumstances no more than reasonable, it is the very risk that the underwriter agreed to assume. On neither supposition do the facts concealed 'change the risk understood to be run.' " (See *Lamb v. Smith*, 18 Fac. Col. (from 1814 to 1815), 220; also § 117 (Civ. Code Cal. 2694).)

In a case where the rate of premium charged and received by the underwriter was so excessive as to indicate unusual anxiety on the part of the insured to effect the policy, and the underwriter declined to ask for any explanation, it was held that he could not afterwards allege that the information which he might have obtained on inquiry had been concealed from him. (*Court v. Martineau*, 3 Doug. 161. As to subsections 4 and 5, see note to § 32.)

§ 28. *Materiality is to be determined, not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries.*

Civ. Code Cal. 2565. N. Y. Civ. Code, 1382.

Materiality, what, in reference to concealment.—

"Is the obligation of a disclosure limited to the facts that are material to the risks considered in their own nature, or does it extend to all that may be deemed material by the insurer, and would probably influence his ultimate decision? Facts that in reality are extraneous to the risks may yet affect the decision of the underwriter; and a *false representation* in relative to them, if such has been its probable effect, is justly held to vitiate the policy. Is a *concealment* of similar facts equally fatal? A single example will illustrate the distinction. Where the underwriter has been induced to accept a lower premium than he would otherwise have demanded, by the false assertion

that a partial insurance on the same property and risks had been previously effected, or was offered to be made, at the same rate, the false representation, although varying in no degree the nature of the risks, is deemed a fraud that annuls the contract; but is an applicant for an insurance, who truly reveals all the circumstances that show the true nature and intrinsic value of the risks, also bound to disclose that other underwriters to whom he had previously applied had declined to assume them, or had demanded a larger premium than those with whom he is dealing were willing to accept? No such obligation exists, if the materiality of facts concealed is to be determined by their actual relation to the risks; but if their probable influence on the judgment of the underwriter is the proper test, the applicant in the case supposed, by limiting his disclosure, would incur the penalty of a fraudulent concealment. Upon this question the authorities, to some extent, are conflicting; but the most reasonable opinion, and that which is best supported by the decisions, seems to be that those facts only are necessary to be disclosed which, as material to the risks, considered in their own nature, a prudent and experienced underwriter would deem it proper to consider. That this is the most reasonable opinion, may be readily evinced. Of the materiality of facts, as tending to show the true nature of the risks that he desires to be covered, the assured ought to be, may be, and usually is, a competent judge. Hence, it is perfectly just to require their disclosure, and not to allow his ignorance or inadvertence as an excuse for the omission. But there is no process of reasoning that can enable the assured to judge of the possible or probable influence on the mind of the underwriter, of circumstances that in reality are extrinsic to the risks. . . . It has been justly remarked by Lord Ellenborough (4 East, 590), that it is nearly if not absolutely impossible for the insured to bring forward and state all the circumstances known to himself, which, although not varying the risk,

may yet influence and vary the opinion of the underwriter. I add, that to impose on the assured the necessity of such a disclosure would sanction a doctrine that in its strict application would render invalid nearly every policy that is possible to be effected; or, stating the truth in a milder form, would introduce into the contract a new element of uncertainty, and would prove a frequent source of vexatious litigation. (See *Carter v. Boehm*, 3 Burr. 1905; *Haywood v. Rogers*, 4 East, 590; *Shoolbred v. Nutt*, cited *Marshall Ins.* 355.)

“Adopting, however, the strictest interpretation of the rule, the duty of communication is not to be limited to facts that are known to exist, or that actually exist. The assured is bound to disclose all the intelligence that he has received, and all the information that he possesses, that relates to facts which, in the sense explained and adopted, are material to the risks, although the information may be of a doubtful character, and may ultimately prove to be untrue. It is sufficient to render the concealment fatal that the intelligence, if communicated, might reasonably have influenced the judgment of the underwriter as to the true nature and value of the risks.” (2 *Duer Ins.* 390, 391.)

“Or in making his inquiries.”—“The information possessed by the assured may not be material in itself, separately considered, yet may be of such a character that it would probably lead to further inquiries on the part of the underwriter; and if the result of the inquiry would show the information to be material, it must be communicated. Its concealment, whether fraudulent or innocent, will vitiate the insurance. So the communication of a fact, otherwise unimportant, may be rendered material and necessary by its connection with other facts or intelligence already known or presumed to be known to the underwriter.” (2 *Duer Ins.* 403, citing *Wilkes v. Glover*, 4 B. & P. 4; *Bridges v. Hunter*, 1 *Maule & S.* 15.)

§ 29. *Each party to a contract of insurance is bound to know all the general causes which are open to his inquiry equally with that of the other, and which may affect either the political or material perils contemplated; and all general usages of trade.*

Civ. Code Cal. 2566. N. Y. Civ. Code, 1383.

Knowledge imputed to the insurer.—"The insured need not mention what the underwriter ought to know, what he takes upon himself the knowledge of, or what he waives being informed of. The underwriter need not be told what lessens the risk agreed and understood to be run by the express terms of the policy. He need not be told general topics of speculation; as for instance, the underwriter is bound to know every cause which may occasion natural perils; as the difficulty of the voyage, the kind of seasons, the probability of lightning, hurricanes, and earthquakes. He is bound to know every cause which may occasion political perils, from the rupture of States, from war, and the various operations of war. He is bound to know the probability of safety, from the continuance and return of peace, from the imbecility of the enemy, through the weakness of their councils, or their want or strength. If an underwriter insure private ships of war by sea and on shore, from ports to ports, and from places to places anywhere, he need not be told the secret enterprises on which they are destined, because he knows some expedition must be in view, and from the nature of his contract he waives the information without being told." (Lord Mansfield, in *Carter v. Boehm*, 3 Burr. 1905.)

§ 30. *The right to information of material facts may be waived either by the terms of insurance or by neglect to make inquiries as to such facts, where they are distinctly implied in other facts of which information is communicated.*

Civ. Code Cal. 2567. N. Y. Civ. Code, 1384.

"By the terms of insurance."—A vessel was insured to Kingston and a market in Jamaica. The master was

instructed, when off the east end of the island, to put in at Port Maria, if in season to fulfill a certain contract for the delivery of goods there; if not, to proceed to Kingston. The vessel accordingly put into Port Maria, but did not touch at Kingston, and was lost on her return voyage homeward to the United States.

The underwriters insisted that the omission to inform them of these instructions was a material concealment. But the Court held that the course taken by the vessel was impliedly within the terms of the policy. (*Houston v. N. E. Ins. Co.* 5 Pick. 89.)

As the seaworthiness of the vessel is an implied warranty in all marine policies, it is unnecessary for the assured, in the absence of inquiry by the insurer, to make disclosure respecting any facts covered by that warranty. (*Sil-loway v. Neptune Ins. Co.* 12 Gray, 73.) Time policies, according to the law of England, constitute an exception to this rule. (See notes to § 107 (Civ. Code Cal. 2681); also *Russell v. Thornton*, 4 Hurl. & N. 788; 30 Law J. Ex. 69.)

§ 31. *Information of the nature or amount of the interest of one insured need not be communicated unless in answer to an inquiry, except as prescribed by section 48.*

Civ. Code Cal. 2568. N. Y. Civ. Code, 1385.

§ 32. *An intentional and fraudulent omission, on the part of one insured, to communicate information of matters proving or tending to prove the falsity of a warranty, entitles the insurer to rescind.*

Civ. Code Cal. 2569. N. Y. Civ. Code, 1386.

This section of the Civil Code, like most of its provisions, is borrowed from the proposed Civil Code of the State of New York. The compilers of that Code refer to Judge Duer's work on Insurance (vol. 2, pp. 435, 573), as illustrating the text of this section. (See also *Bulkley v. Protection Ins. Co.* 2 Paine, 82.)

Concealment of facts covered by warranty.—The general law of insurance holds, that where certain risks

are assumed by the assured, whether by implication or express agreement, he is not required to make any gratuitous disclosure of facts tending to show the actual existence of such risks, unless such disclosure is otherwise material. (*De Wolf v. N. Y. Firem. Ins. Co.* 20 Johns. 214; *Walden v. N. Y. Firem. Ins. Co.* 12 id. 128; *Shoolbred v. Nutt, Park Ins.* 346.)

But Judge Duer (2 Ins. 436) insists that "a policy where the ship is unseaworthy, and the fact is known to and suppressed by the assured, is conclusive evidence of a meditated fraud. The general rule, that the assured is not bound to make any representation in relation to facts that are covered by a warranty, express or implied, is undoubted; but the conclusion to which I refer is indispensable to be stated, as modifying the rule and limiting its application. The rule is not to be understood as meaning that the assured has any right to expect that the underwriter shall rely upon a warranty that he knows himself, or believes on trustworthy information, is actually false; but, on the contrary, his concealment of the facts or information that falsify the warranty is in all cases to be deemed a fraud that vitiates the policy." Section 32 (Civ. Code Cal. § 2569) seems intended to affirm the rule here laid down.

Judge Duer, while conceding that, where the ship is unseaworthy at the commencement of the risk, the premium may be recovered back, in a case free from fraudulent concealment, maintains that if the warranty of seaworthiness were known to be false when the policy was effected, the fraudulent concealment might properly be shown as a bar to a recovery of the premium. (2 Duer Ins. 436.)

The result of this reasoning is, that in all cases in which an implied warranty of seaworthiness exists at the commencement of the risk, proof of unseaworthiness at that time will avoid the policy; and in all cases, proof of a *fraudulent* concealment of such unseaworthiness will not only avoid the policy, but will also prevent a recovery back of the premium.

By the law of England, there is no warranty of seaworthiness in time policies; hence in policies of that class, a concealment of facts known to the assured, tending to show the unseaworthiness of the vessel at the time when the risk commenced, will avoid the policy. (*Russell v. Thornton*, 4 Hurl. & N. 788; 30 Law J. Ex. 69.)

Concealment as respects fire policies.—As a knowledge of facts affecting the risk is commonly more accessible to the insurer against fire than against marine perils, the same particularity of disclosure which is required in respect to the latter is not exacted in respect to the former. No obligation exists on the part of the applicant for a fire policy to disclose matters patent to the observation of the insurer, except in answer to some inquiry made by the latter. (3 Kent's Com. *373; *Gates v. Madison Co. M. I. Co.* 1 Seld. 474; *Carter v. Boehm*, 1 Black. W. 593; *Clark v. Man'g Ins. Co.* 8 How. 235; *Beebe v. Hartford M. Ins. Co.* 25 Conn. 51; *Roth v. City Ins. Co.* 6 McLean, 324, 338; *Merchants & M. M. Ins. Co. v. Washington*, 1 Hand. 408; *Hartford Ins. Co. v. Harmer*, 2 Ohio St. 452.)

But if specific information be required by the insurer on any point that he deems material, it must be truly and fully communicated by the applicant, to the best of his ability. (*Burritt v. Saratoga M. F. I. Co.* 5 Hill, 188; *Hardy v. Union M. F. I. Co.* 4 Allen, 217; *Jacobs v. Eagle M. F. I. Co.* 7 id. 132, 136; *Chaffee v. Cattaraugus M. I. Co.* 18 N. Y. 376; *Davenport v. N. E. Mutual F. I. Co.* 6 Cush. 340; *Hayward v. N. E. Mutual F. I. Co.* 10 id. 444; *Brown v. People's Mut. Ins. Co.* 11 id. 280; *Jenkins v. Quincy Mut. F. I. Co.* 7 Gray, 370; *Lowell v. Middlesex Mut. F. I. Co.* 8 Cush. 127.)

The concealment of peculiar and exceptional facts affecting the risk, such as incendiary attempts to destroy the property, or threats of such attempts, or a reasonable apprehension of such attempts, will avoid the policy. (*Bowery F. I. Co. v. New York F. I. Co.* 17 Wend. 359; *North American F. I. Co. v. Throop*, 22 Mich. 146; Wal-

den v. Louisiana Ins. Co. 12 La. (O. S.) 134; Bufo v. Turner, 6 Taunt. 338; McBride v. Republic F. I. Co. 30 Wis. 562; Curry v. Commonwealth Ins. Co. 10 Pick. 535.)

Concealment as respects life policies.—In respect to concealment of facts in applications for life policies, the tendency of the preponderance of authority is to hold that, while the applicant is bound in good faith to disclose, without specific inquiry, every fact material to the risk, which he believes to be so, the contract will not be avoided by his omission to disclose, without any fraudulent intent, matters as to which no inquiry was made by the insurer, even though such matters were in fact material to the risk. (Rawls v. Am. Mut. L. I. Co. 36 Barb. 357; 27 N. Y. 282; Mallory v. Travelers' Ins. Co. 47 id. 52.)

Inadvertent omission to answer inquiries.—Where the answers of the applicant to questions contained in the application are made warranties by the terms of the policy, and such answers are warranted to be full, correct, and true, the omission to answer a question is no warranty that there is nothing to answer in response to it; and in case of a partial answer, the warranty will not be extended beyond the terms of the answer. If the answer be full and complete as far as it goes, the assured is not to lose the benefit of his policy in case he omits some fact necessary to make any one of the answers to the numerous questions put to him full, because his attention was not particularly called to it, or because it had escaped his attention or memory, or because he did not deem it material to a full answer. (Dilleber v. Home Ins. Co. 69 N. Y. 256, 263; Fitch v. Am. Pop. L. I. Co. 59 id. 557, 573; Edington v. Mut. L. I. Co. 67 id. 185; Swick v. Home Life Ins. Co. 2 Dill. 160.)

Statements as to "disease," etc.—When a question arises as to a misrepresentation or breach of warranty in respect to a statement by the assured that he has had no disease, or serious disease or ailment, injury, or accident, it is for the jury to say, under proper instructions from

the Court, whether the statement was true or false. (*Boos v. World Ins. Co.* 64 N. Y. 236; *Cushman v. U. S. Life Ins. Co.* 70 id. 75; *Life Ins. Co. v. Francisco*, 17 Wall. 672; *Eisner v. Guardian M. I. Co.* 22 Int. Rev. Rec. 152; *Holloman v. Life Ins. Co.* 1 Wood. 674; *Insurance Co. v. Wilkinson*, 13 Wall. 222; *Hogle v. Guardian L. I. Co.* 6 Rob. 567.)

Thus, though the assured may be proved, in contradiction to his statements, to have had, prior to the time of his application, what medical men term a disease, and what is so designated in common parlance, yet if evidence is given tending to show that the illness it produced was very slight, and did not appear to seriously affect the health of the assured, or interfere with his usual vocations, it will be left to the jury to say whether the statements were substantially untrue. (See the cases last cited; also *Campbell v. New England M. L. I. Co.* 98 Mass. 381, 389.)

False answers to unambiguous inquiries.—But an answer clearly false to an unambiguous inquiry made by the insurer will vitiate the policy. (*Edington v. Aetna L. I. Co.* 77 N. Y. 564; *Aetna Life Ins. Co. v. France*, 1 Otto, 510; *Jeffries v. Life Ins. Co.* 22 Wall. 47; *Anderson v. Fitzgerald*, 4 H. L. Cas. 484; *Horn v. Amicable Ins. Co.* 64 Barb. 81.)

Answers to ambiguous questions.—Where a statement made by the applicant, in reply to an ambiguous question by the insurer, is so incorporated in the policy, or so connected with it as to make it a warranty, it will, if proved to be a substantially false answer to the question, when properly construed, avoid the policy; but the substantial truth or falsehood of the statement will be submitted to the jury. Thus, where an applicant was asked, among other questions relating to diseases of the organs of respiration, whether he had been subject to or at all affected by "spitting of blood," to which he answered, "No," evidence having been given on the trial tending to show that he had, prior to the application, been troubled

with spitting of blood, it was held that it was for the jury to decide whether the statement was substantially untrue; that is, whether the spitting of blood by the assured, if proved to have taken place, was under such circumstances as to indicate disease in his throat, lungs, air passages, or other internal organs. (*Campbell v. New England Mutual L. I. Co.* 98 Mass. 381, 406.)

Construction of warranties.—Though it is still the law in life insurance, that where a fact warranted to be true is alleged to be false, the only inquiry that can be permitted is in respect to the truth or falsehood of the warranty (*Miles v. Conn. Ins. Co.* 3 Gray, 580; *Vose v. Eagle Ins. Co.* 6 Cush. 42; *Foot v. Aetna L. I. Co.* 61 N. Y. 571; *Wright v. Equitable L. I. Co.* 50 How. Pr. 367), the courts have striven to prevent this rule from operating unjustly, by giving to the language of the warranty a fair and reasonable interpretation, such as the applicant, under the circumstances of the case, may well be presumed to have put upon it. (*Chattock v. Shaw*, 1 Moody & R. 498; *Fowkes v. Manchester & London L. I. Co.* 3 Fost. & F. 440; *Swick v. Home L. I. Co.* 2 Dill. 160; *Gridley v. Northwestern M. L. Ins. Co.* 14 Blatchf. 107; *Hutchinson v. National Loan Ass. Co.* Court of Sess. Cas. (Scotch) 2 Ser. 467; *National Bank v. Ins. Co.* 5 Otto, 673; *Buell v. Conn. M. L. I. Co.* 5 Bigelow L. and A. I. R. 273; *World Mutual L. I. Co. v. Schultz*, 73 Ill. 586; 5 Bigelow L. & A. I. Rep. 104; *id.* 130, note, 405, note; *Galbraith v. Arlington M. L. I. Co.* 12 Bush, 29; *National Bank v. Ins. Co.* 5 Otto, 672. See *McGinley v. U. S. L. Ins. Co.* 8 Ins. Law J. 540, and editorial note thereto, as to "what constitutes intemperance.")

Even where the assured has used the term "warrant" in reference to the statements contained in his application, if the explanations accompanying that term, and given by the insurer himself in the papers constituting the contract, show that a strict warranty was not intended, these explanations must govern the construction of the term. (*Fitch v. American Pop. L. I. Co.* 59 N. Y. 558.)

In this case, the applicant, after various minute and specific inquiries respecting his habits, constitution, weight, what he wore next his skin, the extreme number of glasses of beer, ale, cider, or wine he drank in a day, how much of these beverages, or either of them, he took in a month, whether he drank his tea or coffee weak or strong, whether his hands and feet were usually warm or cold, the color of the hair, beard, and eyes of various deceased relatives, and, in the language of the Court, "a host of other questions which no human being could with safety undertake to answer accurately and warrant the correctness of his answers," was asked whether he had ever had any illness, local disease, or injury of any organ, he answered, "No." He also stated, in reply to the request to name his "family physician, and each one who has given the party medical attendance," "Have none." It appeared that, some six years before the date of the application, he had sustained a temporary injury to the eye, by sand being thrown into it, which had produced inflammation. For this he had been treated by a physician who had also attended him some three years later for some other complaint not mentioned.

The application declared that the above answers were warranties correct and true; but the policy contained an averment that it was issued in unconditional good faith, with the just intent of fulfilling all its conditions and engagements with absolute certainty. It then proceeded to state that fraud or intentional misrepresentation would vitiate the policy; declared the statements and declarations in the application to be warranties, and in all respects true; and that they did not suppress any fact relative to the assured affecting the interest of the company, or which would tend to influence the company in taking the risk. To the policy was annexed a notice containing, among other matters, the announcement that payment would be contested only in case of fraud.

The Court held that the alleged misstatements were not

warranties, except as to their good faith. That to defeat the policy it must be shown that they were known by the assured to be false, and were made with fraudulent intent. (See, recognizing the same principle, *Fowkes v. Manchester & London L. & L. Ass.* 3 Best & Smith, 917; *Wheelton v. Hardisty*, 8 El. & B. 232; 2 Bigelow L. & A. I. R. 447, and note, 496; also *Washington L. I. Co. v. Haney*, 10 Kan. 525; *Elliott v. Hamilton M. I. Co.* 13 Gray, 139.)

The decisions of the English Courts in respect to the construction of applications for life policies are more rigorous toward the assured than those of the American Courts. (See *London Assurance v. Mansel*, 8 Ins. Law J. 719, and the valuable editorial note appended thereto.)

§ 33. *Neither party to a contract of insurance is bound to communicate, even upon inquiry, information of his own judgment upon the matters in question.*

Civ. Code Cal. 2570. N. Y. Civ. Code, 1387.

His judgment is not considered a matter material to the risk, though the information on which it is founded may be so.

§ 34. *A representation may be oral or written.*

Civ. Code Cal. 2571. N. Y. Civ. Code, 1388.

§ 35. *A representation may be made at the same time with issuing the policy, or before it.*

Civ. Code Cal. 2572. N. Y. Civ. Code, 1389.

§ 36. *The language of a representation is to be interpreted by the same rules as the language of contracts in general.*

Civ. Code Cal. 2573. N. Y. Civ. Code, 1390.

§ 37. *A representation as to the future is to be deemed a promise, unless it appears that it was merely a statement of belief or expectation.*

Civ. Code Cal. 2574. N. Y. Civ. Code, 1391.

"Unless it appears."—But all the attendant circumstances are to be considered in determining the character of such a representation.

The rule is well stated by Mr. Arnould (Ins. vol. 1, p. 510): "Wherever, in fact, from the position of the parties, and the whole circumstances of the case, it is evident that a statement, though in terms a direct and positive assertion, must, in fact, be regarded as a mere expression of expectation or belief, it will be so construed." (Rice v. N. E. M. Ins. Co. 4 Pick. 440; Bryant v. Ocean Ins. Co. 22 id. 200; Alston v. Mechanics M. Ins. Co. 4 Hill, (N. Y.) 329, 340; 2 Duer Ins. 664; Anderson v. Pacific F. & M. I. Co. Law R. 7 Com. P. 65.)

§ 38. *A representation cannot be allowed to qualify an express provision in a contract of insurance; but it may qualify an implied warranty.*

Civ. Code Cal. 2575. N. Y. Civ. Code, 1392.

A representation is never allowed to control an express provision of the policy, though it has been held that when the terms of the representation are not inconsistent with the language of the policy, but merely explanatory of it, they may be proved for the purpose of placing a just construction on the language in question. Thus, permission to touch at a port was shown, by evidence of a letter communicated to the underwriter's agent at the time of signing the policy, to mean to touch there for the purpose of taking in salt; and on this evidence it was held that the taking in of salt there was no deviation. (Urquhart v. Barnard, 1 Taunt. 450.)

But an express warranty cannot be controlled by a representation. (Redman v. Loudon, 3 Camp. 503.) A representation, however, "may qualify an implied warranty." Thus, if the assured should make a representation that a vessel was not properly officered or manned, this would operate, *pro tanto*, as an exception to the implied warranty of seaworthiness. (2 Duer Ins. 671; 1 Arnould Ins. 529.)

§ 39. *A representation may be altered or withdrawn before the insurance is effected, but not afterwards.*

Civ. Code Cal. 2576. N. Y. Civ. Code, 1393.

§ 40. *The completion of the contract of insurance is the time to which a representation must be presumed to refer.*

Civ. Code Cal. 2577. N. Y. Civ. Code, 1394.

Consequently, any representation can be withdrawn, and any material fact not communicated affecting the subject-matter of the insurance can be disclosed, up to the time of the consummation of the contract.

§ 41. *When a person insured has no personal knowledge of a fact, he may nevertheless repeat information which he has upon the subject, and which he believes to be true, with the explanation that he does so on the information of others; or he may submit the information, in its whole extent, to the insurer; and in neither case is he responsible for its truth, unless it proceeds from an agent of the insured, whose duty it is to give the intelligence.*

Civ. Code Cal. 2578. N. Y. Civ. Code, 1395.

When the agent whose duty it is to give his principal information of facts material to the risks insured against fraudulently withholds such information, and insurance is effected by the principal in the absence of such information, the concealment vitiates the policy. (*Fitzherbert v. Mather*, 1 T. R. 12; *Stewart v. Dunlop*, 4 Brown Parl. C. 483, note; *Park on Insurance*, 276-281; *Proudfoot v. Montefiore*, Law R. 2 Q. B. 511.)

§ 42. *A representation is to be deemed false when the facts fail to correspond with its assertions or stipulations.*

Civ. Code Cal. 2579. N. Y. Civ. Code, 1396.

§ 43. *If a representation is false in a material point, whether affirmative or promissory, the injured party is entitled to rescind the contract from the time when the representation becomes false.*

Civ. Code Cal. 2580. N. Y. Civ. Code, 1397.

By the general law of insurance, a representation not fraudulent may be false in a material point, and yet if the insurer has placed no reliance upon it, its falsehood

does not entitle him to rescind the contract. (2 Duer Ins. 681; 1 Arnould Ins. *516; Flinn v. Headlam, 9 Barn. & C. 693; Clason & Dunham v. Smith, 3 Wash. C. C. 156; Commonwealth Ins. Co. v. Monninger, 18 Ind. 352, 363; Campbell v. Merchants' F. I. Co. 37 N. H. 35; Witherell v. Maine Ins. Co. 49 Me. 200; 2 Parsons Mar. Law, 156, note 4; Rowley v. Empire Ins. Co. 40 N. Y. (3 Keyes) 557.)

Facts which it might not otherwise be necessary for the assured to state, because not directly affecting the risk, must be disclosed when made the subject of inquiry by the insurer. (Valton v. National Fund L. I. Co. 20 N. Y. 37; Towne v. Fitchburg F. I. Co. 7 Allen, 51; North American F. I. Co. v. Throop, 22 Mich. 146, 167, 168; Clark v. Manufac. Ins. Co. 8 How. 235; Boggs v. American Ins. Co. 30 Mo. 63; Norwich F. I. Co. v. Boomer, 52 Ill. 442; Laidlaw v. Liverpool etc. Ins. Co. 13 Grant's Ch. U. C. 377; Sussex Co. M. I. Co. v. Woodruff, 2 Dutch. 541, 553; Anderson v. Fitzgerald, 24 Eng. L. & E. 1; Wilson v. Conway F. I. Co. 4 R. I. 141; Beebe v. Hartford Ins. Co. 25 Conn. 51.)

§ 44. *The materiality of a representation is determined by the same rule as the materiality of a concealment.*

Civ. Code Cal. 2581. N. Y. Civ. Code, 1398.

See § 28 (Civ. Code Cal. 2568).

§ 45. *The provisions of this article apply as well to a modification of a contract of insurance as to its original formation.*

Civ. Code Cal. 2582. N. Y. Civ. Code, 1399.

§ 46. *Whenever a right to rescind a contract of insurance is given to the insurer by any provision of this chapter, such right may be exercised at any time previous to the commencement of an action on the contract.*

Civ. Code Cal. 2583.

But although the insurer, prior to the commencement of a suit by the assured on the policy, may not have given him notice that the contract was rescinded, he can of course

set up, as a matter of defense to the suit, any breach of warranty that would have justified him in rescinding the contract, unless he has estopped himself from so doing.

ARTICLE VI.

THE POLICY.

- § 47. Policy, what.
- § 48. What must be specified in a policy.
- § 49. Whose interest is covered.
- § 50. Insurance by agent or trustee.
- § 51. Insurance by part owner.
- § 52. General terms.
- § 53. Successive owners.
- § 54. Transfer of the thing insured.
- § 55. Open and valued policies.
- § 56. Open policy, what.
- § 57. Valued policy, what.
- § 58. Running policy, what.
- § 59. Effect of receipt.
- § 60. Agreement not to transfer.

§ 47. *The written instrument in which a contract of insurance is set forth is called a policy of insurance.*

Civ. Code Cal. 2586. N. Y. Civ. Code, 1400.

A parol contract of insurance is valid, in the absence of any statutory regulation to the contrary. (1 Duer Ins. 60; *Daniels v. Citizens Ins. Co.* 5 Fed. Rep. 425, 430; *Relief F. I. Co. v. Shaw*, 4 Otto, 574; *N. E. Fire and Marine Ins. Co. v. Robinson*, 25 Ind. 536; *Ellis v. Albany City F. I. Co.* 50 N. Y. 402, 405; *Kennebec Co. v. Augusta Ins. & B'k'g Co.* 6 Gray, 204; *Sanborn v. Firemen's Ins. Co.* 16 id. 448.) See also the valuable editorial annotation to *Taylor v. Phoenix Ins. Co.* 8 Ins. Law J. 930, as to when a parol contract of insurance is complete.

Construction of parol contract to insure.—A parol contract by an insurance company to insure property is construed as an agreement to do so by issuing the form of policy used by the company in such case. (*De Grove v. Metropolitan Ins. Co.* 61 N. Y. 594; *Putnam v. Home Ins.*

Co. 123 Mass. 324; *Myers v. London & L. and G. Ins. Co.* 121 id. 338; *Oliver v. Mutual Com. Ins. Co.* 2 Curt. 291.) Such a contract is valid unless forbidden by statute. (*Trustees v. Brooklyn F. I. Co.* 18 Barb. 69; *Hamilton v. Lycoming Ins. Co.* 5 Barr. 339; *Sanford v. Trust F. I. Co.* 11 Paige, 547; *Humphrey v. Hartford Ins. Co.* 15 Blatchf. 504; *Winters v. Lycoming Ins. Co.* 6 Rep. 165; *Commercial M. M. Co. v. Union M. I. Co.* 19 How. 322.)

§ 48. *A policy of insurance must specify—*

1. *The parties between whom the contract is made;*
 2. *The rate of premium;*
 3. *The property or life insured;*
 4. *The interest of the insured in property insured, if he is not the absolute owner thereof;*
 5. *The risks insured against; and*
 6. *The period during which the insurance is to continue.*
- Civ. Code Cal. 2587. N. Y. Civ. Code, 1401.

The third subdivision of the above section might be amended by substituting for it "the subject insured." (See § 2.) As to the fourth subdivision, it is customary in fire policies to require this specification of interest. As to the fifth subdivision, a marine policy which does not specify the particular risks insured against, but insures against the usual marine risks, will be construed to cover losses by barratry and capture. (*Parkhurst v. Gloucester M. F. I. Co.* 100 Mass. 302; *Oliver v. Mutual Com. Ins. Co.* 2 Curt. 290, 291.)

As to what constitutes barratry, see the case of *Atkinson v. Great Western Ins. Co.* 4 Daly, 1, 65 N. Y. 532, in which many cases are cited and examined. It was there held on appeal, that where the master, after giving a clean bill of lading, willfully stows cargo on deck, knowing that he thereby violates his duty, he is guilty of barratry. In such case, the cargo, though stowed on deck, is protected by the barratry clause in the policy. (See also *Lawton v. Sun Mutual Ins. Co.* 2 Cush. 500; *Spinetti v. Atlas S. S.*

Co. 80 N. Y. 71; Meredith's Emerigon, ch. 12, § 3, p. 292; 2 Arnould Ins. *819; 1 Phill. Ins. § 1062, *et seq.*) But if, by reason of such improper stowage, the vessel is unseaworthy at the commencement of the risk, the contract is void *ab initio*, and the barratry clause will not protect the assured. (*Borland v. Merc. M. I. Co.* 46 N. Y. Superior Ct. 433.)

As to the sixth subdivision, the period may either be expressed in terms of time or distance, or made dependent on the occurrence of some specified event.

§ 49. *When the name of a person intended to be insured is specified in a policy, it can be applied only to his own proper interest.*

Civ. Code Cal. 2588. N. Y. Civ. Code, 1402.

(*Burgher v. Columbia Ins. Co.* 17 Barb. 274. See § 51; Civ. Code Cal. § 2590, and note; *Manhattan Ins. Co. v. Webster*, 59 Pa. St. 227; *Mackenzie v. Whitworth*, L. R. 1 Ex. D. 36.)

§ 50. *When an insurance is made by an agent or trustee, the fact that his principal or beneficiary is the person really insured may be indicated by describing him as agent or trustee, or by other general words, in the policy.*

Civ. Code Cal. 2589. N. Y. Civ. Code, 1403.

When the usage of an insurance office was first to issue a certificate of insurance in the name of the applicant, and afterwards to issue to him a policy stating, in substance, that the insurance was for the applicant, as well in his own name as for and in the names of all parties in interest, it was held, a loss having occurred after the issuing of such certificate, no policy having been issued, that the real owner could sue on the contract in his own name. (*Browning v. Prov. Ins. Co. of Canada*, Law R. 5 P. C. 263. See also *Sunderland Marine Ins. Co. v. Kearney*, 16 Q. B. (Ad. & E. N. S.) 925.)

In *Stillwell v. Staples*, 19 N. Y. 401, a fire policy was issued in the sum of \$27,000, covering "the property of

the insured, or held by him in trust in his store in the city of New York." The insured was a manufacturer of cloth, and usually had on hand cloth belonging to others, placed in his hands for the purpose of being manufactured. There was no agreement, however, between the plaintiff and the owners of the cloth in respect to the insurance, nor was there any usage of trade which made it his duty to insure for their benefit; nor did it appear that they knew of the existence of the policy. During the life of the policy, the insured sustained a loss under it: more than \$30,000 of goods of his own property having been destroyed by fire. The insurers paid the amount of the policy. At the time of the loss, the assured had in his possession at his store cloth to the value of about \$900, belonging to one of his customers, who, on hearing of the policy and the payment under it, claimed to be entitled to his proportionate share of the amount paid.

But the Court held, that, the insurance having been without the knowledge of this customer, in no manner adopted or ratified by him, it was competent for the assured, under the terms of the policy, to treat the insurance as having been made simply on his own account to the extent of the property owned by him at the time of the loss; and as this was sufficient to absorb the whole amount of the policy, he was entitled to retain it to his own use.

Snow v. Carr, 61 Ala. 363, is a case in which the facts, in their legal aspect, are not distinguishable from those in *Stillwell v. Staples*, just cited, though the Court deduced from them a directly opposite result. (See also *Siter v. Morris*, 13 Pa. St. 218, holding the same doctrine.)

The two preceding sections are in affirmance of the general rule as laid down by Mr. Parsons (2 Mar. Law, 29), "that if a policy insures the interest of one person only, no other person can show that it was also intended to cover his interest; but it is not regarded as insuring the interest of one person only, if the policy contains the gen-

eral phrase for 'all whom it may concern,' or some other expression indicating that the assured acts as agent or trustee for another; in which case such other person may prove his interest."

§ 51. *To render an insurance effected by one partner or part owner applicable to the interest of his copartners, or of other part owners, it is necessary that the terms of the policy should be such as are applicable to the joint or common interest.*

Civ. Code Cal. 2590. N. Y. Civ. Code, 1404.

If the terms of the policy indicate only that the partner insures the property, or his interest therein, the policy is deemed only to cover the property to the extent of such interest. (Meredith's Emerigon, ch. 11, § 4, p. 264; Bailey v. Hope Ins. Co. 56 Me. 474; Finney v. Warren Ins. Co. 1 Met. 16.) But it seems that a partner intending to insure the interest of his copartners by means of a policy in his own name merely, and paying premium on an amount exceeding his partnership interest, is entitled to recover back the proportion of premium erroneously paid. (Pearson v. Lord, 6 Mass. 81.)

§ 52. *When the description of the insured in a policy is so general that it may comprehend any person or any class of persons, he only can claim the benefit of the policy who can show that it was intended to include him.*

Civ. Code Cal. 2591. N. Y. Civ. Code, 1405.

Who can claim benefit of policy.—"All the authorities go to show that the intention of the party effecting an insurance, at the time of doing so, ought to lead and govern the future use of it, and that no one can by any subsequent act entitle himself to the benefit of it without showing that his interest was intended to be embraced by it when it was made. This rule has especial application to insurances made "for account of whom it may concern"; and where these terms are used in the policy, it is not sufficient for the party who claims the benefit of the in-

insurance to show merely that he is the owner of or has an insurable interest in the goods. He must show that he caused the insurance to be effected for his benefit, or that it was intended, at the time, for his security. These terms in the policy will not, in general, dispense with this evidence. And where the party claiming the benefit cannot show that he caused or directed the insurance to be effected, it will not serve him to rest upon some supposed secret intention, not manifested by a single word or act at the time of the transaction, to mark its character, and indicate the person or persons intended to be insured. That which is not manifested by evidence is to be treated as having no existence. The nature of the transaction must be fixed at the time of insurance, and cannot be changed by subsequent consent of the insured without the authority of the underwriters." (*Steele v. Franklin Insurance Co.* 17 Pa. St. 298. See *Sleeper v. Union Ins. Co.* 61 Me. 267; *Watson v. Swan*, 11 Com. B. N. S. 756; *Frierson v. Brenham*, 5 La. An. 540; *Newson v. Douglass*, 7 Har. & J. 417.)

Insurance by agent for unknown principals.—

It is not necessary that the agent effecting an insurance "for whom it may concern," and intending thereby to cover all insurable interests, should know who the owners of such interests are. If his intention in effecting the insurance be to cover all insurable interests, then, in case of loss, any party who had an insurable interest at the date of insurance, and of the loss, is entitled to the benefit of the policy. (*Sunderland Marine Ins. Co. v. Kearney*, 6 Eng. L. & E. 312; *Sanders v. Hillsborough Ins. Co.* 44 N. H. 238; *Duncan v. Sun Ins. Co.* 12 La. An. 486; *Augusta Ins. Co. v. Abbott*, 12 Md. 348; *Waring v. Indemnity Ins. Co.* 45 N. Y. 606; *Hooper v. Robinson*, 8 Otto, 528.)

Subsequent ratification even after loss.—If an insurance be effected for account of whom it may concern, with the intention of covering all insurable interests, a party holding such an interest, although he may have

given no prior authority to effect such an insurance, can adopt it as soon as it is communicated to him, whether before or after loss. (*Finney v. Fairhaven Ins. Co.* 5 Met. 192; 1 *Phill. Ins.* § 388; *Waring v. Indemnity Ins. Co.* 45 N. Y. 606, 611; 2 *Parsons Mar. Law*, 33; *Meredith's Emerigon*, ch. 11, § 4, p. 262.)

§ 53. *A policy may be so framed that it will inure to the benefit of whomsoever, during the continuance of the risk, may become the owner of the interest insured.*

Civ. Code Cal. 2592. N. Y. Civ. Code, 1406.

For examples of such a policy, see *Rogers v. Traders Ins. Co.* 6 Paige, 583, 597; *Waring v. Indemnity Ins. Co.* 45 N. Y. 611; *Lawrence v. Sebor*, 2 *Caines R.* *203. Under a policy on account of all whom it may concern at the time of loss, it is not necessary for a party included in these terms to prove the existence of any interest on his part at the time of effecting the policy. (*Ellicott v. U. S. Ins. Co.* 8 Gill & J. 166; *Rogers v. Traders Ins. Co.* 6 Paige, 597; 2 *Duer Ins.* 49.)

§ 54. *The mere transfer of a thing insured does not transfer the policy, but suspends it until the same person becomes the owner of both the policy and the thing insured.*

Civ. Code Cal. 2593. N. Y. Civ. Code, 1407.

If a policy contains a stipulation that any change of title in the property insured shall avoid the policy, will the policy re-attach after an absolute sale of the property to a third party, in case the assured again becomes the owner of it, and continues so up to the time of the loss?

In *Power v. Ocean Insurance Co.* 19 Louis, (O. S.) 28, the policy contained a clause providing against any assignment or transfer of the property insured, without consent of the insurer, on pain of nullity. During the continuance of the risk, the property had been sold to one Frederick, without the insurer's consent, but had also been taken back on account of non-payment of the price,

and was in the possession of the assured, as owner, at the time of the loss.

It was contended that, by the express terms of the policy, the insurance was avoided by the sale of the property, without consent of the insurer.

But the Court held that, by the Civil Code of Louisiana, the property had never vested absolutely in the vendee, on account of his failure to pay the price agreed on; and that the only effect of the clause in question was to exempt the insurer from liability during the cessation of the interest of the assured in the property. "During the time Frederick owned the effects, there was, it is true, a suspension of the risks, such as would have taken place had they been temporarily removed from the premises; but the risk revived as soon as the property reverted back to the plaintiff." Judgment was therefore given for the plaintiff.

In *Cockerill v. Cincinnati Ins. Co.* 16 Ohio, 148, it is assumed by both litigants and by the Court, that the re-vesting of title in the assured after a sale will not revive a policy containing a clause declaring that a sale shall avoid it. See, to the same effect, *Home Ins. Co. v. Hauslein*, 60 Ill. 521.

If the effect of the sale be to render the policy null and void, it is difficult to understand how a resale to the assured can revive it, in the absence of any waiver by the insurer of the breach of condition.

If the only effect of the clause avoiding the policy on the sale or transfer of the property be to suspend the operation of the policy during the suspension of the interest of the assured in the property, the clause is simply inoperative; for without it the policy would cease to protect the interest insured so long as such interest was owned by another party than the holder of the policy. (*Worthington v. Bearse*, 12 Allen, 382.)

§ 55. *A policy is either open or valued.*

Civ. Code Cal. 2594. N. Y. Civ. Code, 1408.

§ 56. *An open policy is one in which the value of the thing is not agreed upon, but is left to be ascertained in case of loss.*

Civ. Code Cal. 2595. N. Y. Civ. Code, 1409.

§ 57. *A valued policy is one which expresses on its face an agreement that the thing insured shall be valued at a specified sum.*

Civ. Code Cal. 2596. N. Y. Civ. Code, 1410.

§ 58. *A running policy is one which contemplates successive insurances, and which provides that the object of the policy may be from time to time defined, especially as to the subjects of insurance, by additional statements or indorsements.*

Civ. Code Cal. 2597. N. Y. Civ. Code, 1411.

See *Kennebec Co. v. Augusta Ins. Co.* 6 Gray, 204; *E. Carver Co. v. Manufacturers' Ins. Co.* 6 id. 215; *Stephens v. Australasian Ins. Co.* Law R. 8 Com. P. 18; *Wells v. Pacific Ins. Co.* 44 Cal. 397; *Imperial M. I. Co. v. Fire Ins. Corp.* 4 L. R. C. P. D. 18; *Arnold v. Pacific M. I. Co.* 78, N. Y. 7. In this description of insurance contracts, the underwriter is frequently made liable for losses falling within the general terms of the policy in respect to property, which, from accident or mistake, had not been indorsed on the policy, or brought specifically to the notice of the underwriter before the loss. (See the cases just cited; also notes to § 103 (Civ. Code Cal. 2671).) A running policy "on coffee, to be laden on board vessels from Rio Janeiro to any port in the United States," to add an additional premium if by vessels lower than A 2, or by foreign vessels, contained the following clause: "Having been paid the consideration for this insurance by the assured or his assigns at the rate of $1\frac{1}{2}$ per cent., the premiums on risks to be fixed at the time of indorsement, and such clauses to apply as the company may insert as the risks are successively reported."

Held, that the policy did not take effect on coffee ship-

ped, on merely reporting or declaring the risk, if the vessel ranked lower than A 2; but that the additional premium to be fixed by the underwriter must be also paid or secured to render the policy binding. (*Orient M. Ins. Co. v. Wright*, 23 How. 401. See *Arnold v. Pacific M. I. Co.* 78 N. Y. 7.)

§ 59. *An acknowledgment in a policy of the receipt of premium is conclusive evidence of its payment so far as to make the policy binding, notwithstanding any stipulation therein that it shall not be binding until the premium is actually paid.*

Civ. Code Cal. 2598. N. Y. Civ. Code, 1412.

This rule is founded on the presumption that a policy containing an acknowledgment of the payment of premium, when delivered to the insurer prior to such payment, must have been intended as a waiver of actual payment as a condition precedent to the taking effect of the policy. So far as is necessary to render the policy effectual, the condition of immediate payment of premium is waived, and credit is given to the insured therefor. (*Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345; *Heaton v. Manhattan Ins. Co.* 7 R. I. 502; *Miller v. Ins. Co.* 12 Wall. 285, 303; *Provident Ins. Co. v. Fennell*, 49 Ill. 180; *Bragdon v. Appleton M. F. I. Co.* 42 Me. 259; *Insurance Co. v. Colt*, 20 Wall. 560.) Query as to the law in respect to mutual companies: *Brewer v. Chelsea Ins. Co.* 14 Gray 203; *Mulrey v. Shawmut Ins. Co.* 4 Allen, 116.

§ 60. *An agreement made before a loss, not to transfer the claim of a person insured against the insurer, after the loss has happened, is void.*

Civ. Code Cal. 2599. N. Y. Civ. Code, 1413.

Such an agreement, whether made before or after a loss, is void, as against public policy, because it interferes with the free transmission of property from one person to another. (*West Branch Ins. Co. v. Helfenstein*, 40 Pa. St. 289; *Goit v. National P. I. Co.* 25 Barb. 189.)

ARTICLE VII.

WARRANTIES.

- § 61. Warranty, express or implied.
- § 62. Form.
- § 63. Warranty, in what contained.
- § 64. Past, present, and future warranties.
- § 65. Warranty as to past or present.
- § 66. Warranty as to the future.
- § 67. Performance excused.
- § 68. What acts avoid the policy.
- § 69. Policy may provide for avoidance.
- § 70. Breach without fraud.

§ 61. *A warranty is either express or implied.*

Civ. Code Cal. 2603. N. Y. Civ. Code, 1414.

The term "implied warranty" is most frequently used in respect to policies of marine insurance, and is defined as an agreement not expressed in the policy, but presumed from the fact of making the insurance. (1 Phill. Ins. § 686.)

Among the warranties implied in a policy of marine insurance, unless otherwise agreed by the parties, may be mentioned the following:

1. That the vessel is seaworthy for the service in respect to which she is insured. (Except, according to the English law, when the insurance is on a time policy.)
2. That goods are not exposed, by an unusual mode of storage, to extra risk. (*Leitch v. A. M. Ins. Co.* 66 N.Y. 100.)
3. That the assured will not be guilty of what is known in the law of insurance as a deviation.
4. That the risk is to commence and the policy to attach in a reasonable time.
5. If the neutral character of the subject of insurance is material to the risk, then that such subject, whether ships or merchandise, is neutral and properly documented as such. (*Smith's Mer. Law*, p. 433; *Phill. Ins.* ch. 8.)

§ 62. *No particular form of words is necessary to create a warranty.*

Civ. Code Cal. 2604. N. Y. Civ. Code, 1415.

Warranties must be clearly expressed.—If the language of the policy be ambiguous, so that it is uncertain whether a particular provision in it is to be construed as a warranty or not, it will be held not to be a warranty.

Thus in *National Bank v. Ins. Co. 5 Otto, 673*, the application and survey were made part of the policy, and declared to be a warranty. A provision of the policy also recited that any erroneous representation in a policy should render the policy void.

The application contained a covenant, in substance, that the statements therein contained were a full exposition of all the facts, so far as known to the applicant and material to the risk. It also contained a provision declaring the policy void if the assured "makes any erroneous representations." The application stated that the insured building was worth \$15,000, and the insured machinery \$15,000. It was found, on the trial, that the building was worth only \$8,000, and the machinery only \$12,000. The Court held this to be a breach of warranty, precluding a recovery on the policy. On appeal, the Supreme Court held, that when a policy of insurance contains contradictory provisions, or has been so framed as to leave room for construction, rendering it doubtful whether the parties intended the exact truth of the applicant's statements to be a condition precedent to any binding contract, the Court should lean against that construction which imposes upon the assured the obligations of a warranty. "The company," remarks the Court, "cannot justly complain of such a rule. Its attorneys, officers, or agents prepared the policy for the purpose, we shall assume, both of protecting the company against fraud, and of securing the just rights of the assured under a valid contract of insurance. It is its language which the Court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself."

The Court, in delivering its opinion, laid great stress on

the contradictory terms contained in the agreement, stipulating in one place for the truth and sufficiency of the statements contained in the application, "*so far as known to the applicant,*" and in another for the absolute correctness of those statements.

See also, as sustaining the general rule in respect to the strict construction of warranties in policies of insurance, the following cases: *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 452; *Higbie v. Guardian M. L. Ins. Co.* 53 N. Y. 603; *Fitch v. American Popular L. I. Co.* 59 id. 557; *McCulloch v. Norwood*, 58 id. 562; *Owens v. Holland P. I. Co.* 56 id. 565; *Wilson v. Hampden Ins. Co.* 4 R. I. 157; *O'Neill v. Buffalo F. I. Co.* 3 N. Y. 122; *Maher v. Hibernian Ins. Co.* 6 Hun, 353; *United States Ins. Co. v. Kimberly*, 34 Md. 224; *Smith v. Mechanics' F. I. Co.* 32 N. Y. 399; *Schmidt v. Peoria Ins. Co.* 41 Ill. 295; *Everett v. Continental Ins. Co.* 21 Minn. 76; *Dilleber v. Home Ins. Co.* 69 N. Y. 256; *Frisbie v. Fayette M. I. Co.* 27 Pa. St. 325; *Aurora F. I. Co. v. Eddy*, 55 Ill. 213; *American Basket Co. v. Farmville Ins. Co.* 8 Reporter, 744.

As most of the terms and conditions of the policy are inserted in it by the insurer, without consulting the assured, the construction of any term or condition of this character will, in case of doubt or ambiguity, be construed most strongly against the insurer. (*Civ. Code Cal.* § 1654; *American Basket Co. v. Farmville Ins. Co.* 8 Reporter, 744; *Anderson v. Fitzgerald*, 4 H. L. Cas. 484; *Hoffman v. Aetna Ins. Co.* 32 N. Y. 405; *Bassett v. Am. F. I. Co.* 2 Hughes, (U. S.) 536; *Ins. Co. v. Slaughter*, 12 Wall. 404; *Mayor v. Hamilton F. I. Co.* 39 N. Y. 45; *Bartlett v. Union M. & F. Ins. Co.* 46 Me. 500; *Barnes v. Holland*, 10 Ex. 802.

§ 63. *Every express warranty made at or before the execution of a policy must be contained in the policy itself, or in another instrument signed by the insured, and referred to in the policy as making a part of it.*

Civ. Code Cal. 2605. *N. Y. Civ. Code*, 141

Distinction between warranties and representations.—This section indicates one of the marked distinctions between a representation and a warranty. No statement of the assured is a warranty, unless actually contained in the policy, or made part of it by reference and adoption. While it is sufficient that a representation be substantially true, or if prospective that it be substantially complied with, a warranty must be literally true, or if prospective must be exactly fulfilled. Thus in the case of *Pawson v. Watson*, Cowp. 785, a representation was made by the assured, in respect to the ship *Julius Cæsar*, as follows: "She mounts twelve guns and twenty men." The vessel was insured by various underwriters, and was soon afterwards captured, having on board six four-pounders, three one-pounders, and six half-pounders, which are called swivels, sixteen men, and eleven boys. One of the underwriters testified that he considered her stronger with this force than if she had carried twelve carriage guns (which defendant claimed to be the meaning of the term "guns") and twenty men, as represented. The defendant treated the representation as a warranty, and contended that it had not been fulfilled according to its true signification, and that therefore the policy was void. The Court (Lord Mansfield presiding), in delivering judgment, said: "There is no distinction better known to those who are at all conversant in the law of insurance than that which exists between a warranty or a condition which involves part of a written policy, and a representation of the state of the case. Where it is a part of the written policy, it must be performed: as, if there be a warranty of convoy, there must be a convoy. Nothing tantamount will do or answer the purpose. It must be strictly performed as being part of the agreement, for here it might be said the party would not have insured without convoy. . . . So that there cannot be a clearer distinction than that which exists between a warranty which makes part of

the written policy and a collateral representation, which, if false in a point of materiality, makes the policy void."

On a question suggested by the underwriters in this case, "whether it was the opinion of the Court that to make written instructions valid and binding as a warranty they must be inserted in the policy," Lord Mansfield answered, that most undoubtedly that was the opinion of the Court; adding that, "if a man warrants that a ship shall depart with twelve guns, and it departs with ten only, it is contrary to the condition of the policy."

It will be observed that §§ 68 and 69 (Civ. Code Cal. 2610, 2611) introduce into the law of insurance the novel doctrine of *immaterial* warranties.

§ 64. *A warranty may relate to the past, the present, the future, or to any or all of these.*

Civ. Code Cal. 2606. N. Y. Civ. Code, 1417.

§ 65. *A statement in a policy of a matter relating to the person or thing insured, or to the risk as a fact, is an express warranty thereof.*

Civ. Code Cal. 2607. N. Y. Civ. Code, 1418.

"As a Fact."—Thus where a vessel was described in the policy as "the good American ship called the Rodman, this was held a warranty that the ship was American. (*Barker v. Phoenix Ins. Co.* 8 Johns. 307.) So where a policy was effected "on goods on board the Mount Vernon, an American ship," this description was held to be a warranty that the ship was a regularly documented American vessel. (*Baring v. Claggett*, 3 Bos. & P. 201, 5 East, 398.

So the description in a policy of property on board the "Swedish brig Sophia" is an absolute warranty that the vessel was Swedish, and parol evidence is inadmissible to show that anything less was intended by the parties to the insurance. (*Lewis v. Thatcher*, 15 Mass. 431.) But a statement in a policy that the vessel was called "the

American ship President," was held not a warranty of her American character. (*Le Mesurier v. Vaughan*, 6 East, 382.) So the calling a vessel by an English name is not a warranty that she is English; as when a Spanish vessel was described as the "Three Sisters," instead of the "Tres Hermanos." (*Clapham v. Cologan*, 3 Camp. 382. So a stipulation that the insurers are not to be liable for damage to or from the sheathing of a vessel is not a warranty that she is sheathed. (*Martin v. Fishing Ins. Co.* 20 Pick. 389.

§ 66. *A statement in a policy which imports that it is intended to do or not to do a thing which materially affects the risk, is a warranty that such act or omission shall take place.*

Civ. Code Cal. 2608. N. Y. Civ. Code, 1419.

See § 37 (Civ. Code Cal. 2574); also *Murdock v. Chango Ins. Co.* 2 Comst. 210.

This section appears to be based on the doctrine laid down in *Bilbrough v. Metropolitan Ins. Co.* 5 Duer, 587, in which the representation respecting the insured property (machinery and stock, manufactured and unmanufactured) in a certain cotton mill was as follows: To an inquiry in the application, "During what hours is the factory worked?" the answer was: "We run the cards, picker, drawing frames, and speeder, day and night, the rest only twelve hours daily. We only intend running nights until we get more cards, etc., which are making; shall not run nights over four months." Held, that this expression of an intention by plaintiff to cease running at nights when they got the cards which were then making was a warranty that they would then cease, and that the clause as to not running over four months was a stipulation that in no event should the period during which the cards were making exceed that time. (*S. P. Ripley v. Aetna Ins. Co.* 30 N. Y. 136.)

In *Grant v. Aetna Ins. Co.* 15 Moore P. C. C. 515, such a

statement of intention as is described in § 66 (Civ. Code Cal. § 2608) was held not to be a warranty. In that case a fire policy for \$4,000, dated 30th July, 1858, described the vessel as "the steamboat Malakoff, now lying in Tait's Dock, Montreal, and intended to navigate the St. Lawrence and Lakes, from Hamilton to Quebec, principally as a freight boat, and to be laid up for the winter in a place approved by the company." The steamboat never left Tait's wharf, but was burned there June 25th, 1859.

The Privy Council, overruling the judgment of the Court of Queen's Bench for Lower Canada, delivered an opinion, from which the following is an extract: "If they (the words in question) import an agreement that the ship shall navigate in the manner described in the policy, they must be considered as a warranty, and, the engagement not having been performed, whether the engagement was material or not material, the insurers are discharged. But their Lordships think that this is not the true meaning of the words used. They consider that the clause in question amounts only to this: the assured says: "My ship is now lying in Tait's Dock. I mean to remove her for the purpose of navigation in the manner described, and if I do, the policy shall be in force; but in that case I engage to lay her up in winter in a place to be approved by the company. This construction, which implies no contract to navigate, seems to their Lordships the natural meaning of the words used, and imputes a reasonable intention to the parties to the policy." (See *Benham v. United G. & L. Ass. Co.* 7 Ex. 744.)

In *Catlin v. The Springfield Fire Ins. Co.* 1 Sum. 434, a policy was issued, dated May 30th, 1825, insuring against fire for six years property described as "a dwelling-house, farm, and shed, etc., at present occupied by one Joel Rodgers as a dwelling-house; but to be occupied hereafter as a tavern, and is privileged as such."

The dwelling-house thus insured was destroyed by fire February 22nd, 1830.

The court charged the jury that the words of the policy, in respect to the occupation of the property, did not constitute "a warranty that the house should, during the continuance of the risk, be constantly occupied as a tavern; but that the language was, at farthest, a mere representation of the intention to occupy it as a tavern, and to secure for it the privileges of the policy as such. And," continues the court (Story, J.), "I am, upon further reflection, clearly of the opinion that the direction was right. We must interpret these instruments in a reasonable manner, from the nature and objects of the parties. Here the assured was the mortgagee of the house; and he is so described in the policy. In the ordinary course of things he could not be presumed, as mortgagee, to intend to take possession of the property, and occupy it as a tavern; and of course, if occupied as a tavern, it must be by or under the mortgagors. In point of fact, as the survey, made by the company's own agent, and on which the policy itself was underwritten, states, it "was to be occupied in the course of two or three days by the said Hayden and Hobart, for the purpose of keeping a tavern." In the mouth of the mortgagee, then, if the language were to be treated as his, it could fairly be understood to import no more than a representation that it was to be occupied as a tavern. And if so, then, as taverns are enumerated in the conditions of the company as among the hazardous risks, for which an extra premium is to be paid, it would follow that the policy would be void for a fraudulent concealment, unless the fact were disclosed, and the house privileged as a tavern. . . . It was not, then, a warranty of the assured that it should be at all times during the risk occupied as a tavern, but a license or privilege granted by the company that it might be so occupied."

The statement in the policy of an intention to do or omit to do some act in respect to the property insured will not, under § 66, amount to a warranty, unless the act or omission materially affects the risk. But a positive

statement in a policy that some act respecting the property insured shall be done or omitted is, under the general law of insurance, regarded as a warranty, whether such act or omission be material to the risk or not. (*Glen v. Lewis*, 8 Ex. 607; *Kimball v. Ætna Ins. Co.* 9 Allen, 540; *Stebbins v. Globe Ins. Co.* 2 Hall, 632; *Ripley v. Ætna Ins. Co.* 30 N. Y. 136.)

It may be questioned whether the language of § 66 (Civ. Code Cal. § 2608) is a correct expression of the existing law. If regarded as prescribing an amendment of that law, the phraseology employed seems to require some modification. Thus, in the case above cited, of *Grant v. Ætna Ins. Co.*, the statement in the policy imported that it was intended that the steamer, then lying at the wharf, should navigate the waters referred to. Such was, in all probability, the intention of the assured, as the court, in construing the language used, finds it to have been. But the expression of this intention was inserted in the policy, not for the purpose of creating an obligation on the assured to fulfill such intention, but of giving him the privilege of doing so if he desired.

So in the case of *Catlin v. Springfield F. I. Co.* 1 Sum. 434, there was an expression of intention to occupy the insured dwelling as a tavern; but, as shown by the Court, the clause of the policy which contained it was intended as a stipulation by the company that, although the house should be occupied as a tavern, the company would take the more hazardous risk, and permit the policy to continue.

It is difficult to assign any satisfactory reason why a statement made by the assured in a policy, that he intends to do or to abstain from doing some particular act respecting the insured property, should in all cases be held as a warranty that he will so do or will so abstain. Such a rule dispenses with any process of construction, and arbitrarily attaches to certain expressions in a contract a peculiar signification which may never have been intended

by the parties, and which, if intended, they have failed to indicate. It is conceded that, by the general law of insurance, a warranty must be strictly true, and if promissory, that it must be exactly fulfilled ; but why should any of its terms be arbitrarily held to import something not deducible from them by just principles of construction ? (See *Bryant v. Ocean Ins. Co.* 22 Pick. 200.)

If it should be deemed expedient to retain in the Civil Code of California the principle laid down in *Bilborough v. Metropolitan Ins. Co.* 5 Duer, 587, on which § 66 is apparently founded, the language of the section should at least be modified so as to restrict it to cases where the statement is intended as a covenant or stipulation on the part of the assured, and not as the admission of a concession or privilege granted him by the insurer.

The remarks of Judge Duer on the effect of a representation of intention by the assured are reasonable and just. "Where the assured, or his agent in his name, declares that he *intends* to pursue a certain course, or to perform certain acts, he has an entire liberty to change the intention so declared. The representation creates no positive duty of performance, but if made with an actual intent to deceive, the fraud, as in all other cases, vitiates the contract. . . . The statement of an intention evidently implies that the party has no present knowledge of any circumstance that will occasion its alteration. It is therefore a promise that the intention, as declared, will be executed, unless something shall occur, if not to justify, at least to induce its abandonment or change. When the party means, as soon as the insurance is effected, to pursue a different course from that which he professes to intend, the representation is false, and cannot escape the imputation and the consequences of actual fraud. . . . Thus, if the owner of a vessel insured at her home ports, who had stated to the underwriter that he intended to send her with a certain cargo favorable to the risks, should proceed, as soon as the policy was effected, to put

on board a different cargo, materially enhancing the risks, his conduct would undoubtedly create and justify a presumption that it was with the sole object of deceiving the insurers that the representation was made; and this presumption could only be repelled by a clear explanation of the motives that had induced a change in his determination. Without such evidence, the inference that the intention declared never existed would seem to be irresistible." (2 Duer Ins. 707. See also *Alston v. Mechanics M. Ins. Co.* 4 Hill, 329; and 2 Parsons Mar. Law, 159, note 3.)

§ 67. *When, before the time arrives for the performance of a warranty relating to the future, a loss insured against happens, or performance becomes unlawful at the place of the contract, or impossible, the omission to fulfill the warranty does not avoid the policy.*

Civ. Code Cal. 2609. See N. Y. Civ. Code, 1420.

Non-fulfillment of promissory warranty.—This section seems to contain two propositions, which may be thus stated: 1. When, before the time arrives for the performance of a warranty relating to the future, a loss insured against happens, the omission to fulfill the warranty does not prevent a recovery for the antecedent loss. (See 2 Parsons Mar. Law, 108.)

2. When, before the time arrives for the performance of a warranty relating to the future, performance of such warranty becomes unlawful at the place of the contract, or impossible, the omission to fulfill the warranty does not avoid the policy. (See 2 Parsons Mar. Law, 108, citing *Brewster v. Kitchell*, 1 Salk. 198.)

In respect to the former of these propositions, if the thing insured be totally lost in consequence of a peril insured against, before the time arrives for the fulfillment of some warranty in respect to it, the fulfillment of which is rendered impossible by its loss, the omission to fulfill does not avoid the policy, but the insurer is liable for the loss.

But if the loss be merely partial, not preventing the subsequent fulfillment of the warranty, its occurrence will not excuse the non-fulfillment of such warranty.

The proposition contained in the section last cited, that if the performance of a promissory warranty becomes unlawful by the *lex loci contractus*, or impossible, the omission to fulfill it does not avoid the policy, seems open to serious question.

Performance of promissory warranty a condition precedent to recovery on the policy.—If a promissory warranty be, as some English authorities maintain, a condition precedent, without fulfillment of which the contract does not take effect (1 Arnould Ins. *583, and cases cited), it is difficult to understand how its non-fulfillment from any cause whatever can fail to avoid the contract. In any point of view, performance of the warranties contained in the policy is a condition precedent to the right of recovery upon it. To allege that it became impossible or illegal for the assured to perform such condition may excuse him, in a certain sense, for its non-performance, but will avail him nothing in a suit by him on the policy. To treat such an excuse as equivalent to performance would be to disregard the terms of the policy, and force a new contract on the insurer.

See, as to the principle here asserted, the following cases: *Mizele v. Burnett*, 4 Jones, N. C. 249; *Poussard v. Spiers*, Law R. 1 Q. B. D. 410; *Bettine v. Gye*, Law R. 1 id. 183; *Howell v. Knickerbocker L. I. Co.* 44 N. Y. 276; *Benjamin on Sales*, 2 Am. ed. § 574; *The Onrust*, 1 Ben. 431, 444; *Harmony v. Bingham*, 12 N. Y. 100; *Tompkins v. Dudley*, 25 id. 275-278; *Dexter v. Norton*, 47 id. 62; *Wheeler v. Conn. M. L. I. Co.* 82 N. Y. 544. Considerations of equity would seem to require that where a contract cannot be fulfilled because its fulfillment has become unlawful, both parties should be discharged from their obligations under it; as in the case of a charter party, the

fulfillment of which, in consequence of a declaration of war, involves the necessity of trading with the enemy. (See *Ex parte Bownan*, 7 El. & B. 783; *Barker v. Hodgdon*, 3 Maule & S. 267, 270; *Reid v. Hoskins*, 4 El. & B. 984; *Geipel v. Smith*, Law R. 2 Q. B. 98; *Bradford v. Jenkins*, 41 Miss. 334; *Gray v. Sims*, 3 Wash. C. C. 276.)

"Impossible."—What is meant by the term "impossible"? There is authority for holding that it means, incapable of accomplishment by reason only of the act of God or the public enemy. (Bishop on Contracts, § 612, and cases cited.) But supposing it to mean, absolutely incapable of performance from any cause whatever, the doctrine stated in the text does not appear to be in conformity with the general principles of the law merchant. (*Scott v. Libbey*, 2 Johns. 340; *Hills v. Sughrue*, 15 Mees. & W. 253; *Burrill v. Cleeman*, 17 Johns. 72; *Marquis of Bute v. Thompson*, 13 Mees. & W. 487; *Abbott on Shipping*, (452), (468); *Sjoerds v. Luscombe*, 16 East, 201; *The Harri-man*, 5 Sawy. 612; 9 Wall. 161; *The Onrust*, 1 Ben. 431, 444.)

Effect of illegality or impossibility of performance on contract.—It is not intended here to deny the proposition that if performance of a covenant becomes illegal in consequence of a law passed after it was entered into, the illegality of performance is a good defense to an action brought by the covenantee to recover damages for non-performance. But the question involved in § 67 is, whether, if the fulfillment of such covenant were a condition precedent to a right of recovery against the other contracting party, the illegality of its performance could be treated as a dispensation from the necessity of performing it. The general analogies of the law seem to indicate that it could not. (See *Worthington v. Charter Oak L. Ins. Co.* 41 Conn. 407; *Tait v. N. Y. L. Ins. Co.* 4 Bigelow L. & A. Ins. R. 484; *Dexter v. Norton*, 47 N. Y. 62; *Wheeler v. Connecticut Mutual L. I. Co.* 82 id. 544.)

Future protection of policy ceases after breach of promissory warranty.—If the non-fulfillment of a promissory warranty be regarded not as avoiding the contract *ab initio*, but only from the time of such non-fulfillment, the fact that fulfillment was legally or physically impossible will not, it would seem, obviate the effect of the breach in depriving the property thenceforth of the protection of the policy. The fulfillment of the warranty may, in such case, be regarded as a condition precedent to the right of recovery for any loss happening after the time when such fulfillment should have been, but was not, accomplished. If the warranty be not fulfilled, from whatever cause, no further recourse, it would seem, can be had on the policy. (See the cases last cited.)

Conditions contained in policy not necessarily warranties.—A clause contained in the policy making it the duty of the assured, after a loss has occurred, to protect the property, and use his best efforts to prevent further loss, is not considered as a warranty, the non-performance of which will avoid the policy. (*Cincinnati F. M. I. Co. v. May*, 20 Ohio, 229.) The rule applies only to warranties which are to be fulfilled prior to the loss. The policy may, however, contain conditions subsequent as to proofs of loss, etc., the non-observance of which may defeat an action by the assured upon it.

Warranty considered as a condition precedent to a right of action, must be performed.—“No cause however sufficient, no motive however good, no necessity however irresistible, will excuse non-compliance with an express warranty. If it be not in fact complied with, the policy is void. Even the direct and irresistible operation of a peril expressly insured against in the policy is no excuse for non-compliance. Thus (*Hore v. Whitmore*, Cowp. 784) where a ship warranted to sail on a given day was prevented from doing so by an embargo laid on by a British governor, this breach of the express warranty was held to avoid the policy, although

such embargo came expressly within the words 'restraints and detainments of kings, princes, and people,' etc., which were perils expressly insured against in the policy." (1 Arnould Ins. *584.)

If, in an action on a policy, the assured is to be permitted to set up in reply to a plea of breach of warranty the impossibility of fulfillment, the liability of insurers will be enlarged far beyond any limits to which it has hitherto been supposed to extend. As to the nature of the impossibility that will excuse non-performance of a contract, see 19 Am. Law Reg. N. S. 350, referring to Anson on Contracts, 310, and various other authorities.

§ 68. *The violation of a material warranty or other material provision of a policy, on the part of either party thereto, entitles the other to rescind.*

Civ. Code Cal. 2610. N. Y. Civ. Code, 1421.

All warranties hitherto considered as material ex vi termini.—"The violation of a *material* warranty." The introduction into the law of insurance of the doctrine of immaterial warranties effects a radical change in the signification heretofore attached to the term "warranty." If the materiality of a warranty is to be left open to inquiry, the only substantial distinctions remaining between a warranty and a representation are, that the former must constitute a part of the policy, and must be strictly fulfilled; while the latter precedes the issuing of the policy, does not form a part of it, and requires only a substantial fulfillment. So that a warranty, according to this section of the Code, except on the points just mentioned, is identical with a representation.

The distinction between a representation and a warranty is thus stated by Marshall (Ins. p. 346): "Whether the warranty be material to the risk or not, the insured stakes his claim of indemnity upon the precise truth of it if it be affirmative, or upon the exact performance of it if executory; but it is sufficient if a representation be made

without fraud, and be not false in any material point, or if it be substantially though not literally fulfilled." (See also 1 Arnould Ins. *581.)

The only exception recognized by the general law to this rigorous rule (if indeed any can be admitted) is where the warranty is made in reference to a state of things which has ceased to exist, and the cessation of which has made a fulfillment of the warranty at once useless and impossible; as, if during war a warranty that a vessel should sail with convoy was inserted in the policy, and peace was declared before the day on which the vessel was to sail, so that convoy would no longer be attainable, and if attainable, would be useless. Ought compliance with such a warranty to be required when the reason for demanding it has entirely ceased? (See 1 Arnould Ins. *584; 2 Duer Ins. 702, 703.)

In view of the provisions of the Code on this subject, it will be found prudent for insurers, under policies governed by its provisions, if they intend to preclude all inquiry into the materiality of any warranty, to insert in the policy, pursuant to § 69 (Civ. Code Cal. § 2611), a condition that the breach of it shall avoid the policy.

Inexpediency of admitting evidence in respect to materiality of warranties.—Mr. Arnould (1 Ins. p. *580) remarks, "that it appears better to avoid entering in any case into the question of the materiality of the fact alleged, both because it is a departure from what has hitherto been regarded as a fixed principle of decision with regard to warranties, as distinct from representations; and secondly, because it calls upon the Court and jury to decide upon a point most difficult to be ascertained; viz., the impossibility of the underwriters having been influenced by the fact thus alleged."

The Code, while holding that every warranty is not necessarily material, allows the parties (§ 69, Civ. Code Cal. § 2611) to make it material by expressly stipulating that a non-observance of it shall avoid the policy. It may

be questioned whether it was judicious to disturb so elementary a principle of the law of insurance as that which maintained the necessary materiality of all warranties, in order to accomplish a result that must prove of so little practical importance.

§ 69. *A policy may declare that a violation of specified provisions thereof shall avoid it, otherwise the breach of an immaterial provision does not avoid the policy.*

Civ. Code Cal. 2611. N. Y. Civ. Code, 1422.

See *National Bank v. Ins. Co.* 5 Otto, 673.

§ 70. *A breach of warranty without fraud merely exonerates an insurer from the time that it occurs; or where it is broken in its inception, prevents the policy from attaching to the risk.*

Civ. Code Cal. 2612. N. Y. Civ. Code, 1423.

Where the policy is not void in its inception, the insurer is liable for losses that may have occurred prior to a breach of warranty without fraud. Such, at least, is the American rule. A warranty is sometimes described as a condition precedent, the non-fulfillment of which annuls the contract *ab initio*. Mr. Arnould (Ins. vol. 1, p. *583) supports this view of the case in respect to promissory warranties, on the ground that such must be regarded as the intention of the parties to the contract.

The better opinion, however, seems to be in accordance with the text of § 70 (Civ. Code Cal. § 2612), that in the case of a promissory warranty, the policy is a protection to the assured, in a case free from fraud, for losses occurring prior to a breach of the warranty. (2 Parsons Mar. Law, 108; 1 Phill. Ins. § 771.)

A fraudulent representation respecting the risk, and *a fortiori* a fraudulent warranty, avoid the contract *ab initio*, and at the same time prevent a recovery back of any part of the premium. But where a material representation or a warranty, though not fraudulent, is false in fact, so that the risk has never attached, the assured is

entitled to a return of the premium, deducting, however, a small percentage, regulated either by custom or by stipulation in the policy. (See § 74 (Civ. Code Cal. § 2619); 1 Arnould Ins. *488, *494; 2 Arnould Ins. *1211, *1231; Meredith's Emerigon, ch. 16, § 1, p. 651; Mount v. Waite, 7 Johns. 434; Hentig v. Staniforth, 5 Maule & S. 122; Waddington v. U. S. Ins. Co. 17 Johns. 23; Clark v. Manuf. Ins. Co. 2 Wood. & M. 494, 495; Code de Commerce, art. 349, 358; Taylor v. Sumner, 4 Mass. 56.)

Waiver of breach of conditions of policy.—Any forfeiture of a policy caused by a violation of its terms will be deemed waived by the insurer, if, after knowledge of the facts constituting such forfeiture, he treats the policy as obligatory.

“When there has been a breach of a condition contained in an insurance policy, the insurance company may or may not take advantage of such breach, and claim a forfeiture. It may, consulting its own interests, choose to waive the forfeiture; and this it may do by express language to that effect, or by acts from which an intention to waive may be inferred, or from which a waiver follows as a legal result. A waiver cannot be inferred from its mere silence. It is not obliged to do or say anything to make the forfeiture effectual. It may wait until claim is made under the policy, and then, in denial thereof, or in defense of a suit commenced therefor, allege the forfeiture. But it may be asserted broadly that if, in any negotiations or transactions with the assured, after knowledge of the forfeiture, it recognizes the continued validity of the policy, or does acts based thereon, or requires the insured by virtue thereof to do some act or incur some trouble or expense, the forfeiture is, as matter of law, waived; and it is now settled in this Court, after some difference of opinion, that such a waiver need not be based upon any new agreement or an estoppel.” (Titus v. Glens Falls Ins. Co. 81 N. Y. 419; citing Allen et al. v. Vermont Mut. F. I. Co. 12 Vt. 366;

Webster v. Phoenix Ins. Co. 36 Wis. 67; Gans v. St. Paul Ins. Co. 43 Wis. 109; Insurance Co. v. Norton, 6 Otto, 234; Goodwin v. Mass. M. L. I. Co. 73 N. Y. 480, 493; Prentice v. Knickerbocker L. I. Co. 77 id. 484; Brink v. Hanover F. I. Co. 80 id. 108.

ARTICLE VIII.

PREMIUM.

- § 71. When premium is earned.
- § 72. Return of premium.
- § 73. When none allowed
- § 74. Return for fraud.
- § 75. Over-insurance by several insurers.
- § 76. Contribution.
- § 77. Proportionate contribution.

§ 71. *An insurer is entitled to payment of the premium as soon as the thing insured is exposed to the peril insured against.*

Civ. Code Cal. 2816. N. Y. Civ. Code, 1424.

Commencement of risk.—The risk frequently commences prior to the actual issue of the policy, the assured being protected in the mean time by a preliminary agreement containing the terms of the contract, and operating as an actual insurance, until the execution and delivery of the policy.

Marine policies are frequently executed to take effect on the happening of a contingency specified in the policy; as, on a ship "at and from" some specified foreign port to the destination named; in which case the policy takes effect only on the safe arrival of the vessel within a reasonable time at the port designated.

It is held, that under such a policy, the ship, after her arrival, should prepare, with reasonable diligence, to proceed on her voyage. An unreasonable delay in port will discharge the insurer; but what is an unreasonable delay will depend on the circumstances of each particular

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case. Any delay that may be necessary in order to enable the ship to leave port in good condition to pursue her voyage is permitted. (*Columbian Ins. Co. v. Catlett*, 12 Wheat. 283; *Grant v. King*, 4 Esp. 175; *Smith v. Surridge*, 4 id. 25; *Phillips v. Irving*, 7 Man. & G. 325.)

In a voyage policy to commence "at and from the port of M.," it is *prima facie* an implied condition that the ship shall be at the port within such a time, that the risk shall not be materially varied. If there is a delay beyond this time, the policy does not attach, even though such delay may be beyond the control of the assured. (*De Wolf v. Archangel Maritime B. & I. Ins. Co.* Law R. 9 Q. B. 451.)

Where the terms of the policy indicate that the risk is intended to commence on the occurrence of a certain event (which, in point of fact, has already occurred), the property will be insured from that time, although in the policy a future date is assigned for such occurrence. (*Cobb v. N. E. M. M. I. Co.* 6 Gray, 192.)

§ 72. *A person insured is entitled to a return of premium as follows:*

1. *To the whole premium, if no part of his interest in the thing insured be exposed to any of the perils insured against.*

2. *Where the insurance is made for a definite period of time, and the insured surrenders his policy, to such proportion of the premium as corresponds with the unexpired time, after deducting from the whole premium any claim for loss or damage under the policy which has previously accrued.*

Civ. Code Cal. 2617. N. Y. Civ. Code, 1425.

The first subsection of this section merely affirms the established rule that where, from any cause other than the fraud of the assured, the property has not been exposed to any of the perils insured against, the assured is entitled to a return of the premium, of which, however, a small percentage is usually retained by the insurer, either by usage or pursuant to stipulation to that effect. (See notes to § 70 (Civ. Code Cal. § 2612).)

A person insured is not entitled, by the existing law, to a return of premium, under the circumstances set forth in the second subsection of § 72, except by virtue of an agreement with the insurer. A stipulation, substantially in the terms stated in this subsection, is frequently inserted in fire policies, but is not adapted to life or marine insurance. Stipulations of this character must be fully and exactly complied with by the insurer. *Hathorn v. Germania Ins. Co.* 55 Barb. 28; *Van Valkenburgh v. Lenox F. I. Co.* 51 N. Y. 465.

As to the recovery of premiums paid on illegal policies, see note to § 74. Also, modifying the doctrine there stated, see *Lowry v. Bourdieu*, 2 Doug. 468; *Tappenden v. Randall*, 2 Bos. & P. 467; *Aubert v. Walsh*, 3 Taunt. 276; *Palyart v. Leckie*, 6 Maule & S. 290.

If the contract was legal when made, but has become illegal by matter *ex post facto*, both parties are discharged from its obligations. *Gray v. Sims*, 3 Wash. C. C. 276; *Oom v. Bruce*, 12 East, 223; *Hentig v. Stamford*, 5 Maule & S. 122. If the assured has been induced to enter into the contract by fraud on the part of the insurer, he can avoid the policy and recover back the premium, without deducting the stipulated or customary percentage. 2 Phill. Ins. § 1845.

Where the policy has once attached to the risk, in respect to the entire subject-matter of the insurance, the insured is not entitled, except by special agreement or established usage, to claim a return of any part of the premium, although the extent or duration of the risk may actually prove to have been much less than was contemplated by the parties when the policy was issued. (2 Phill. Ins. § 1820; *Tyrie v. Fletcher*, 2 Camp. 666; *Lorraine v. Tomlinson*, 2 Doug. 585.)

Mr. Parsons, after citing and commenting on several cases in which a partial return of premium was claimed, remarks, "that if the premium is entire, the presumption is that it is not to be severed or returned in part; but this

presumption may be rebutted either by provisions of the policy indicating a different intention, or by a reasonable usage sufficiently established. There seems to be no necessity for any special provision for 'short interest,' or a deficiency in the subject-matter insured." (2 Parsons Mar. Law, 191.)

The last clause in the above extract refers to the case where only a part of the property intended to be insured is exposed to the risk, in which event the excess of premium, over and above that demandable on the property actually exposed to the risk, is to be returned. (2 Parsons Mar. Law, 188.)

If the premium is distributed in specified proportions over several separate risks—as, for example, if a premium of \$1,000 is apportioned thus: \$300 on voyage from San Francisco to Hong Kong, \$300 from Hong Kong to Rio Janeiro, \$400 from Rio Janeiro to London—the premium would seem to be returnable as to any portion of the designated voyage, in respect to which no risk was incurred. (*Stevenson v. Snow*, 3 Burr. 1237; *Waters v. Allen*, 5 Hill, 421.)

Partial return of premium for short interest under French law.—The French Code de Commerce, article 356, provides, in respect to the return of premiums on marine policies, as follows: If the insurance is on merchandise for the voyage and return, and if, the vessel having arrived at her first destination, no cargo is obtained for the return voyage, or if a full cargo is not obtained, the insurer receives only the proportional two-thirds of the stipulated premiums, in the absence of any agreement to the contrary.

This section presupposes one premium paid for the voyage and return; so that, according to strict legal principles, the risk having once commenced, the insurer would be entitled to retain the entire premium. The French Code has attempted to introduce, in such cases, a more equitable rule. The section just cited provides for two cases:

1st. Suppose the vessel takes no return cargo: in this case one-half the voyage has been accomplished, and one-half the premium is therefore considered to be due. As to the return portion of the voyage, the law, considering that the insurer has been at no risk in respect to it, decides that no premium ought to be paid for it; but as an indemnity to the insurer for this partial deviation from the contract, gives him a sixth of the stipulated premium, which, added to the half paid on the outward voyage, constitutes the two-thirds of the premium.

2nd. Suppose there is a return cargo, but it is not complete: a larger amount of the premium ought, of course, to be retained. The following example will show how this amount is to be arrived at:

A policy, at a premium of \$600, is obtained on a cargo of merchandise worth \$80,000, from Bordeaux to Martinique and back. The cargo is delivered at Martinique, but a return cargo worth only \$40,000 is brought back. How is the amount of the proportional two-thirds of \$600 premium to be ascertained?

On \$40,000 premium is due, both for the outward and return voyage, as that amount of cargo was carried each way.....	\$300
On the outward trip there was, in addition, cargo carried to the amount of \$40,000; this for both trips would be \$300, two-thirds of which amount to.....	200
	<hr/> \$500

See annotation by Rogron to § 356, Code de Commerce.

§ 73. *If a peril insured against has existed, and the insurer has been liable for any period, however short, the insured is not entitled to return of premiums so far as that particular risk is concerned.*

Civ. Code Cal. 2618. N. Y. Civ. Code, 1427.

This section is merely a restatement, in a different form, of § 71. If the risk insured against has been in-

curred for any period of time, however brief, the insurer, in the absence of any agreement to the contrary, is entitled to retain the entire premium paid in respect to such risk. (See Meredith's Emerigon, ch. 16, § 2, p. 654.)

§ 74. *A person insured is entitled to a return of the premium when the contract is voidable on account of the fraud or misrepresentation of the insurer, or on account of facts, of the existence of which the insured was ignorant without his fault; or when, by any default of the insured other than actual fraud, the insurer never incurred any liability under the policy.*

Civ. Code Cal. 2619. N. Y. Civ. Code, 1426.

See *Martin v. Aetna L. I. Co.* 4 Ins. Law J. 899; *Boland v. Whitman*, 33 Ind. 64; *Delavigne v. U. S. Ins. Co.* 1 Johns. Ch. 310; *Clark v. Manufacturers' Ins. Co.* 2 Wood. & M. 472, 494; *Friesmuth v. Agawam M. I. Co.* 10 Cush. 587; *Stevenson v. Snow*, 3 Burr. 1240.

In the case of a premium paid on a contract of insurance known by the insured to be illegal, the premium cannot be recovered back. (*Marck v. Abel*, 3 Bos. & P. 35; *Lubbock v. Potts*, 7 East, 449; *Vandyck v. Hewitt*, 1 East, 96; 2 Phill. Ins. § 1846.)

§ 75. *In case of an over-insurance by several insurers, the insured is entitled to a ratable return of the premium, proportioned to the amount by which the aggregate sum insured in all the policies exceeds the insurable value of the thing at risk.*

Civ. Code Cal. 2620. N. Y. Civ. Code, 1428.

“With regard to return of premium for short interest, over-insurance, and double insurance, the principle on which the cases depend is simply this: that if the underwriter could, at any time, and under any conceivable circumstances, have been called on to pay the whole sum on which he has received premium, in such case the whole premium is earned, and there shall be no return. If, on the other hand, he could never in any event have

been thus called upon to pay the whole, but only a part of the amount of his subscription—say a half or a fourth—he ought not to retain a larger proportion than one-half or one-fourth of the premium, and must return the residue.

“The cases in which he may be so called on to make return are: 1st. Where, in either a valued or open policy, only part of the property specified in or declared on the policy is put on board; as, for instance, if ‘100 bales of cotton’ be insured, ‘valued at £1,000,’ or ‘at £10 per bale,’ or if ‘100 bales of cotton’ be specified in the policy as the subject of insurance, without any valuation—in such or the like cases, if there be only fifty bales on board, or only half the quantity of interest intended and declared to be insured, a return of half the premium must be made for short interest.” (2 Arnould Ins. *1226, *1227.)

“The next case is where, in an open policy on goods or freight, the sum insured (i. e., the aggregate of the different subscriptions) exceeds the value of the property at risk; as, for instance, if the amount underwritten be £1,000, and the insurable value of the goods on board be only £500, or half the sum insured; consequently, by the rule above stated, there must be a return of half the amount of the premium. This is called a return for over-insurance. (2 Arnould Ins. *1228.)

Section 75 is merely an application, to the case of several insurers, of the rule that the excess of premium paid, over and above that covering the risk actually incurred under the policy, must be returned. So the Code de Commerce, § 358, provides, in substance, that, in the absence of fraud or deceit (on the part of the assured), the policy is effectual to the amount of the agreed or actual value of the merchandise, as the case may be. In the event of loss, the insurers contribute in proportion to the sums respectively insured by them. They do not retain the premium on the excess of the amount insured

over the value, but are entitled merely to an indemnity of one-half per cent. thereon.

§ 76. *When an over-insurance is effected by simultaneous policies, the insurers contribute to the premium to be returned in proportion to the amount insured by their respective policies.*

Civ. Code Cal. 2621. N. Y. Civ. Code, 1429.

When several simultaneous policies are issued on the same risk, there is, in fact, but one insurance, in which each insurer participates in proportion to the amount of his policy. (Marshall Ins. 115.) In such case, though the amounts insured in the aggregate by the various policies may exceed the insurable value of the subject in respect to which the risk has actually been incurred, each insurer must contribute to pay the loss in such proportion as the amount of his policy bears to the amount of all the policies, and the return of premium is adjusted in the same proportion.

Thus, suppose that the insurable value of the thing insured being only \$10,000, it is insured by three simultaneous policies; one by A of \$8,000, one by B of \$4,000, and one by C of \$3,000. In the event of a total loss, the insured can recover \$10,000, of which A pays eight-fifteenths, B four-fifteenths, and C three-fifteenths. Of the premium to be returned on the excess of \$5,000, supposing the rate to have been the same in each policy, A receives eight-fifteenths, B four-fifteenths, and C three-fifteenths.

§ 77. *When an over-insurance is effected by successive policies, those only contribute to a return of the premium who are exonerated by prior insurances from the liability assumed by them, and in proportion as the sum for which the premium was paid exceeds the amount for which, on account of prior insurance, they could be made liable.*

Civ. Code Cal. 2622. N. Y. Civ. Code, 1430.

In the case of successive marine policies (as to fire, see § 88), each insurer subsequent to the first is considered

as insuring against loss by the specified perils only to the extent of the insurable value of the subject-matter over and above the sum already insured upon it when he issued his policy. Thus, suppose goods insured on a voyage in three successive policies of \$10,000 each, making \$30,000 in the aggregate, the premium paid being \$100 to each insurer. The goods actually laden on board and put at risk are of the value of only \$15,000. A total loss occurs. This leaves the first insurer liable for the whole amount of his policy, \$10,000, and the second for \$5,000, while the third, who has actually incurred no risk, is exonerated. The assured is entitled to a return premium of \$150 for "short interest." This is paid by the insurers on the second and third policies, the former paying \$50 and the latter \$100, subject to any customary or stipulated deduction.

The provisions of § 77 are analogous to those of article 359 of the French Code de Commerce, which provides that, in case of several contracts of insurance made without fraud on the same cargo, if the first contract insures the entire value of the property, it alone will be enforced. The insurers in the subsequent contracts are discharged, each retaining half per cent. of the amount by him insured. If the entire value of the cargo is not insured by the first contract, the insurers who have signed the subsequent contracts are responsible for the residue, according to the order of the dates of their contracts.

American clause.—The subject of the ratable return of premium in case of over-insurance is usually regulated, in American marine policies, by an express agreement known as the American clause, which provides, in substance, that "if the insured shall have made any prior insurance, then the insurer shall be answerable only for so much as the amount thereof may be deficient toward fully covering the subject insured, and the insurer shall return the premium upon so much of the sum by him assured as by said prior insurance he shall be exonerated

from. And in case of any insurance upon the same subject-matter, subsequent in date to this policy, the insurer shall nevertheless be answerable for the full extent of the sum by him subscribed, without right to claim contribution from such subsequent assurers, and shall accordingly be entitled to retain the premium by him received, in the same manner as if no such subsequent assurance had been made." (See *American Ins. Co. v. Griswold*, 14 Wend. 399; *Seamans v. Loring*, 1 Mason, 127.) This clause relates to priority in actually effecting the insurance, not to priority of date in the policies. (1 *Arnould Ins.* 295.)

The effect of this clause was discussed by the Court of Errors of New York, in the case of *The American Ins. Co. v. Griswold*, 14 Wend. 399. The invoice cost of the cargo shipped at New York was \$47,096. This property was insured in three policies, issued respectively, May 17th, May 26th, and May 28th, 1824, for the term of eighteen months, on a trading voyage; the first policy being for \$20,000, the second for \$10,000, and the third for \$15,000, making an aggregate of \$45,000. Each policy contained the American clause. In October, 1824, part of the cargo, amounting to nearly \$21,000, was safely landed and disposed of at Callao. The sum of \$2,014, specie, proceeds of sale of part of the cargo, was there shipped on board the vessel. A few weeks afterwards the vessel, with this specie, and with the residue of the cargo on board, amounting, at the invoice price, to \$27,050, was seized by the military authorities at Callao, and became totally lost to the owners, and was subsequently abandoned by them to the insurers.

The first insurer, being sued for \$20,000, the amount of his policy, contended that he was liable, under the American clause, only for such a proportion of the loss (\$27,050) as \$20,000, the amount of his policy, bore to the whole interest (\$47,096) on board when the several policies were issued. The plaintiffs insisted that they were entitled to recover from the insurers on the first policy \$20,000, and on the second policy \$1,050, without regard to so much of

the property originally covered by the policies as was represented by the cargo which had been discharged at Callao before the loss.

It was decided by the Court of Errors that the first insurer was liable, under the circumstances stated, for the full amount of his policy, as the cargo on board at the time of the loss exceeded the amount insured by him, and that he was not entitled, under the American clause, to contribution from subsequent insurers.

That when the \$21,000 worth of cargo was landed at Callao, the policy last in date was relieved from liability, and that relief extended in the inverse order of the dates of the policies, which were respectively for \$20,000, \$10,000, and \$15,000. Estimating the loss at \$27,050, the first insurer would be liable for \$20,000, and the second for \$7,050.

The Court differed in opinion on the questions presented in this case, and the judgment actually pronounced has been subjected to some adverse criticism. See 2 Phill. Ins. § 1261; 2 Parsons Mar. Law, 98; Whiting v. Independent Ins. Co. 15 Md. 297.

It seems that the French law would hold, in such case, that all the policies were relieved, each *pro rata*, to the amount of the goods safely landed before the loss. Pouget, 1 Droit Mar. 197, cites a decision of the Court of Aix, by which it was held, that if the amount of the policies, which did not originally exceed the value of the cargo, exceeds it subsequently in consequence of discharges of cargo *en route*, the risk is deemed to have diminished proportionally, on each discharge, in the interest of each insurer, whatever may be the date of the policies.

This rule was maintained to be the correct one in the dissenting opinion of Mr. Senator Tracy, in the case of the American Ins. Co. v. Griswold, 14 Wend. 399, 505, above referred to.

In the case of Lucas v. Jefferson Ins. Co. 6 Cowen, 635, the defendant had issued a policy to plaintiff against loss

by fire to the amount of \$4,000. The Chatham and the Ætna Fire Insurance companies insured plaintiff on the same property, the former \$5,500, the latter \$6,000; a loss was sustained by fire, which the plaintiff contended amounted to about \$20,000, while the defendant insisted that it was not more than between \$9,000 and \$10,000. The policy issued by defendant contained the following clause: "In case of any other insurance upon the property hereby insured, whether prior or subsequent to the date of this policy, the insured shall not, in case of loss or damage, be entitled to demand or recover on this policy any greater portion of the loss or damage sustained than the amount insured shall bear to the whole amount insured on the said property."

It was proved by defendant that the Chatham and Ætna Insurance companies had paid \$9,583.34 on their policies, and it was conceded by the defendant on the trial that the loss amounted to at least that sum. No evidence was given as to whether these policies contained a similar clause to that above recited. The opinion of the Court was to the effect that if these policies contained such a provision, the insurers under them were liable to pay their proportionate part of the loss; that if they had paid in excess of that part, the defendant could derive no benefit therefrom; but that if these policies contained no such provision, and the insurers had paid the full amount of the loss, plaintiff could not recover, and in such case the defendant would be liable to the other insurers for its proportionate amount of the loss paid by them.

Prohibition against other insurance.—Policies frequently contain a condition prohibiting other insurance without permission of the insurer, under penalty of avoiding the policy. (*Harris v. Ohio Ins. Co.* 5 Ohio, 467; *Allison v. Phoenix Ins. Co.* 3 Dill. 480; *Stacey v. Franklin Ins. Co.* 2 Watts & S. 506; *Clark v. New England M. F. I. Co.* 6 Cush. 342; *Carpenter v. Prov. Ins. Co.* 16 Peters, 495; *Schenck v. Mercer Co. M. I. Co.* 4 Zab. 447;

Battle v. Merchants Ins. Co. 3 Rob. (La.) 384; *Philbrook v. New England M. I. Co.* 37 Me. 137; *Gilbert v. Phoenix Ins. Co.* 36 Barb. 372; *Hardy v. Union M. Ins. Co.* 4 Allen, 217; *Hygum v. Aetna Ins. Co.* 11 Iowa, 21; *Forbush v. Western M. I. Co.* 4 Gray, 337; *Kimball v. Howard F. I. Co.* 8 Gray, 33.

But if the "additional insurance" be void on its face, it will not affect the policy. (*Mitchell v. Lycoming Ins. Co.* 51 Pa. St. 402; *Bigler v. N. Y. Central Ins. Co.* 20 Barb. 635; 22 N. Y. 402; *Stacey v. Franklin F. I. Co.* 2 Watts & S. 506; *David v. Hartford F. I. Co.* 13 Iowa, 69; *Obermeyer v. Globe M. Ins. Co.* 43 Mo. 573.)

Some authorities hold that, although the other insurance be not void on its face, but only voidable by proof of extrinsic facts, it annuls the policy at the option of the insurer. (*Bigler v. N. Y. Central Ins. Co.* *supra*; *David v. Hartford F. I. Co.* 13 Iowa, 69; *Mitchell v. Lycoming M. Ins. Co.* 51 Pa. St. 402; *Carpenter v. Providence W. I. Co.* 16 Peters, 495; *Jacob v. Equitable Ins. Co.* 19 Up. Can. Q. B. R. 256, 257.)

Some policies provide that other insurance, whether valid or invalid, shall avoid the policy. The validity of such a provision has been questioned, on the ground that a void contract is, in judgment of law, a mere nullity, and cannot therefore affect the rights of parties under any existing contract. (*Gale v. Ins. Co.* 41 N. H. 170; *Gee v. Cheshire Co. M. F. I. Co.* 55 id. 65.) But as the moral risk may be greatly increased, in consequence of the belief of the assured that the additional insurance which he has effected is valid, there seems to be no good reason why the insurer should not be permitted to protect himself against this risk by inserting in the policy the provision in question. This view was sustained in *Bigler v. New York Central Ins. Co.* 22 N. Y. 402, and *Continental Ins. Co. v. Heilman & Co.* 9 Ins. Law J. 91.

ARTICLE IX.

LOSS.

§ 78. Perils remote and proximate.

§ 79. Loss incurred in rescue from peril.

§ 80. Excepted perils.

§ 81. Negligence and fraud

§ 78. *An insurer is liable for a loss of which a peril insured against was the proximate cause, although a peril not contemplated by the contract may have been a remote cause of the loss; but he is not liable for a loss of which the peril insured against was only a remote cause.*

Civ. Code Cal. 2626. N. Y. Civ. Code, 1431.

In the case of *Mathews v. The Howard Ins. Co.* 11 N. Y. 1, a collision occurred between the insured vessel, a propeller, and a bark on Lake Huron, by which the latter alone sustained damages.

Proceedings were taken against the propeller (the insured vessel) in admiralty, and the Court held that the collision resulted from the negligence of her officers and crew, and decreed damages against her. Her owners, on payment of the amount, claimed the right to recover it from the insurers, under a policy which covered "perils of the lakes, rivers, canals, fires, jetsams, and damage to the said vessel, or any part thereof."

But the Court, Denio, J., held that "it was the negligence of the master and crew which furnished the basis of the proceeding and the aliment of the judgment. Without that feature, the collision and the injury to the bark would have been harmless as it regards the propeller, whatever damage the bark might have suffered. . . . All this is very different where the insured vessel is itself injured by a collision, or other marine accident, resulting from the negligence of her own crew. The damage is the direct and immediate consequence of the collision, and it arises equally whether the crew have been vigilant or careless. The assured has

only to prove the collision and the damage, and his case is made out, and the defendants cannot shield themselves by going back to the cause of the collision. But in a case like the present, where the insured vessel sustained no damage by the contact, proof of the collision and of damage to another vessel show nothing which will sustain an action. The plaintiff must go farther, and establish the fault of his own servants, and that such fault has been productive of a lien, obtained through proceedings *in rem.* in the admiralty Courts. I think, therefore, that the reasoning concerning remote and proximate causes of loss and damage is inapplicable to this case; for I regard the negligence of the plaintiffs' servants as the sole efficient cause of the loss which he has sustained. The winds, the waves, and the collision are instrumentalities through which the wrong of the crew became fruitful in a loss to the vessel which they had in charge. They do not, I think, stand in the relation of cause and effect."

See *Taylor v. Dewar*, 5 Best & Smith, 58, construing a clause by which the underwriter insured "against damages caused to any other vessel by collision, for which the insured might be held liable."

In *De Vaux v. Salvador*, 4 Ad. & E. 420, the assured had been compelled to pay for an injury done to another vessel by a collision caused by the mutual fault of both vessels, the damage having, by a decree in admiralty, been apportioned between the two. The policy covered perils of the sea. The assured sued the insurer to recover the amount which his vessel had been decreed to pay. But the Court of King's Bench held that the recovery must be limited to the amount of damage actually sustained by the insured vessel from the collision.

In the case of *Peters v. Warren Ins. Co.* 14 Peters, 99, which came before the Supreme Court of the United States soon after the decision in *De Vaux v. Salvador*, just cited, a collision between two vessels, the *Penguin* and the *Paragon*, had taken place without fault on either

side, near the port of Hamburg; and the Marine Court of Hamburg, after hearing the cause, decreed that the loss should be borne equally by both vessels. The owner of one of the vessels, the *Paragon*, which at the time of the collision was insured against sea perils, sued the insurer to recover the amount awarded against that vessel. The Court, Story, J., delivering the opinion, decided that he was entitled to recover, on the ground that the collision, which was adjudged to have been without fault on either side, was clearly a sea peril, and was the sole proximate cause of the loss; and the decree of the Court only ascertained and fixed the amount chargeable upon the *Paragon*, and attached thereto at the very moment of the collision. The Court commented on the decision in *De Vaux v. Salvador*, which it declined to follow.

In the case of the *General Mutual Ins. Co. v. Sherwood*, 14 How. 351, the question was presented to the Supreme Court of the United States, whether, under a policy against sea perils, the insurer is liable to repay to the assured damages paid by him to the owners of another vessel and her cargo, suffered in a collision occasioned by the negligence of the master or mariners of the vessel insured. The Court answered this question in the negative. Curtis, J., who delivered the opinion, remarks: "It is true, that an expense, attached by the law maritime to the subject insured, solely as a consequence of a peril, may be considered as proximately caused by that peril. But where the expense is attached to the vessel insured, not solely in consequence of a peril, but in consequence of the misconduct of the servants of the assured, the peril *per se* is not the efficient cause of the loss, and cannot, in any just sense, be considered its proximate cause. In such a case, the real cause is the negligence, and unless the policy can be so interpreted as to insure against all losses directly referable to the negligence of the master and mariners, such a loss is not covered by the policy. We are of opinion the policy cannot be so construed.

When a peril of the sea is the proximate cause of the loss, the negligence which caused that peril is not inquired into: not because the underwriter has taken upon himself all risks arising from negligence, but because he has assumed to indemnify the insured against losses from particular perils, and the assured has not warranted that his servants will use due care to avoid them." Mr. Justice Curtis distinguished the case from that of the *Paragon*, cited above, by remarking, that "it was there determined that a collision without fault was the proximate cause of that loss. In Massachusetts, however, it is held that the insurer is liable for compensatory damages in collision paid by the assured. (*Nelson v. Suffolk Ins. Co.* 8 Cush. 477; *Walker v. Boston Ins. Co.* 14 Gray, 288; *Blanchard v. Equitable Safety Ins. Co.* 12 Allen, 386.)

The French law appears to adopt the contrary rule. (See 1 Pouget Droit Mar. 110; Meredith's Emerigon, ch. 12, § 14.)

In the case of *Simpson v. Thomson*, L. R. 3 App. C. 279, two ships belonging to the same owner collided, and one was sunk; the underwriters paid the insurance effected on the lost ship, and then claimed to rank *pari passu* with the owners of cargo destroyed, in the distribution of a fund lodged in Court by the owner, as proprietor of the offending ship, under statutes 17 and 18 Vict. c. 104; 25 and 26 Vict. c. 63, 64. These statutes are to the same general effect, and designed to answer the same general purpose, as §§ 4283, 4284 of the Revised Statutes of the United States.

It was held that the underwriters of the lost ship had no right of action against the owner of the offending ship, as he himself had no such right, inasmuch as, being the owner of both vessels, any right of action he had must be a right of action against himself, which is an absurdity, and a thing unknown to the law.

"If," said Lord Chancellor Cairns, in his opinion, "the insurance is a contract to indemnify against the conse-

quences of the negligent navigation of any other ship of the insured, it would be little short of an absurdity that the underwriters should in the first place indemnify the insured for the consequences of that navigation, according to their contract, and immediately afterwards recover the amount back from the insured as damages occasioned by this negligent navigation."

Negligence of agents of assured.—If the loss is caused by the direct and immediate operation of a peril insured against, the insurer is liable, although the property may have been exposed to such peril through the negligence of the assured or his agents.

As to fire policies: *Gates v. Madison Co. M. I. Co.* 1 Seld. 469; *Gove v. Farmers' Ins. Co.* 48 N. H. 41; *Johnson v. Berkshire M. F. I. Co.* 4 Allen, 388; *Henderson v. Western Marine F. I. Co.* 10 Rob. (La.) 164; *Wood's Fire Ins.* § 101; *Angell on Ins.* §§ 122-130.

In the cases referred to in these authorities, though the property was exposed to the peril insured against through the negligence or fault of the assured or their agents, yet as the direct cause of the loss was the operation of such peril, the insurer was held liable. The same rule, so far at least as concerns losses occasioned by the negligence of the agents of the assured, though some of the earlier decisions held otherwise, is now firmly established in the law of marine insurance. (*Dixon v. Sadler*, 5 Mees. & W. 405; *Patapsco Ins. Co. v. Coulter*, 3 Peters, 222; *Waters v. The Merchants' L. I. Co.* 11 id. 213; *American Ins. Co. v. Bryan*, 26 Wend. 583; *Perrin v. Protection Ins. Co.* 11 Ohio, 147; *Georgia Ins. & Trust Co. v. Dawson*, 2 Gill, 365; *Copeland v. N. E. Marine I. Co.* 2 Met. 432; *Firemen's Ins. Co. v. Powell*, 13 Mon. B. 371; *Hale v. Washington Ins. Co.* 2 Story, 176, 184; *Redman v. Wilson*, 14 Mees. & W. 476.)

Proximate and remote causes.—The insurer "is not liable for a loss of which the peril insured against was only a remote cause."

Thus where a ship was driven ashore by a gale, but in an undamaged condition, on a hostile coast, and was there captured, the loss was ascribed to the capture, and not to perils of the seas; "for," said the Court, "had the ship been driven on any other coast but that of an enemy, she would have been in perfect safety." Consequently the insurers were not liable on a policy which excepted losses by capture. (*Green v. Elmslie, Peake*, 212. See also *Livie v. Janson*, 12 East, 648; *Rice v. Homer*, 12 Mass. 230.)

In the absence of some special provision extending the usual responsibility of the underwriter, injuries to cargo arising from ordinary dampness of the hold, increased by a long voyage through southern latitudes, in consequence of perils of the sea sustained by the ship, must be borne by the assured, because such injuries arise from the nature of the goods themselves, and not from the direct operation of any sea peril as the proximate cause; but the underwriter is liable for injuries to the goods caused by an extraordinary formation of steam or gases, arising from an extraordinary access of sea water into the hold, by reason of perils of the sea. (*Cory v. Boylston Ins. Co.* 107 Mass. 145, citing *Baker v. Manufacturers' Ins. Co.* 12 Gray, 603; *Montoya v. London Assurance Co.* 6 Ex. 451; *Taylor v. Dunbar*, Law R. 4 Com. P. 206.)

For illustrations of the maxim, *causa proxima non remota spectatur*, see *Insurance Co. v. Boon*, 5 Otto, 130; *Waters v. Louisville Ins. Co.* 11 Peters, 220; *Ionides v. U. M. Ins. Co.* 108 E. C. L. (14 C. B.) 260; *Dabney v. New England M. I. Co.* 14 Allen, 300; *Dole v. N. E. M. Ins. Co.* 2 Cliff. 432; *Magoun v. N. E. M. Ins. Co.* 1 Story, 157; *Potter v. American Ins. Co.* 3 Sum. 27; *Brown v. St. Nicholas Ins. Co.* 61 N. Y. 332; *Washburn v. Western Ins. Co.* 9 Ins. Law J. 424; *Insurance Co. v. Tweed*, 7 Wall. 44; *Howard F. I. Co. v. Norwich & N. Y. Trans. Co.* 12 Wall. 194; *Norwich & New York Transp. Co. v. Western Mass. Ins. Co.* 34 Conn. 561; 6 Blatchf. 241, 252;

12 Wall. 194; *Johnston v. West of Scotland Ins. Co.* 7 Ct. of Ses. Cas. 52; *Nave v. Home Mutual Ins. Co.* 37 Mo. 429.

§ 79. *An insurer is liable where the thing insured is rescued from a peril insured against, that would otherwise have caused a loss, if in the course of such rescue the thing is exposed to a peril not insured against, which permanently deprives the insured of its possession, in whole or in part; or where a loss is caused by efforts to rescue the thing insured from a peril insured against.*

Civ. Code Cal. 2627; N. Y. Civ. Code, 1432.

If goods insured against fire are in imminent peril from that risk, so that their removal is essential to prevent their destruction, a loss by theft consequent on such removal, provided the same be effected with due care and caution, must be borne by the insurer, in the absence of any provision to the contrary in the policy. (*Tilton v. Hamilton Fire Ins. Co.* 1 Bosw. 363, 385; *Leiber v. Liverpool Ins. Co.* 6 Bush, 639; *Whitehurst v. Fayetteville M. I. Co.* 6 Jones, (N. C.) 352; *Lewis v. Springfield F. and M. I. Co.* 10 Gray, 154; *Brady v. N. W. Ins. Co.* 11 Mich. 425; *Case v. Hartford Ins. Co.* 13 Ill. 676; *Newmark v. London & L. F. Ins. Co.* 30 Mo. 160; *Witherell v. Maine Ins. Co.* 49 Me. 200. See also as to liability of insurer for loss incurred by removal of property in apprehension of fire: *Thomson v. Montreal Ins. Co.* 6 Up. Can. Q. B. 319; *Agnew v. Ins. Co.* 3 Phila. 193; *White v. Republic Fire Ins. Co.* 57 Me. 91.)

So, if goods insured against fire were rescued from that peril by means of water thrown upon them in the process of extinguishing the fire, the insurer would be liable for the loss, unless excepted by the terms of the policy, although damage by water was not insured against. (*Stanley v. Western Ins. Co.* Law R. 3 Ex. 71; *Talaimon v. Home Ins. Co.* 16 La. An. 426; *Geiseck v. Crescent N. I. Co.* 19 id. 297; *Hillier v. Alleghany Ins. Co.* 3 Barr. 471; *Independent M. I. Co. v. Agnew*, 34 Pa. St. 96.)

In *Evans v. Columbian Ins. Co.* 44 N. Y. 146, the total loss of a vessel was caused by the bursting of a boiler, which exploded with such force as to open the vessel's side, so that she sank in five minutes. The policy excepted any loss "subsequent" to such bursting, but the loss in question was not deemed to be of that character, and the insurer was held liable.

In *Hahn v. Corbett*, 2 Bing. 209, goods were insured "free from capture or seizure," on a voyage from London to Maracaibo. In the course of her voyage, a few miles from Fort San Carlos, the vessel, being obliged to come to an anchor for want of a pilot, drifted on the sand, and was lost by perils of the sea. While in this condition, the goods were seized by the Spanish Government as prize, on the ground that they had been shipped for the supply of persons carrying on hostilities against that Government. No part of the cargo was restored to the possession of the insured.

The question arose, whether the loss was by a peril of the seas, or by capture or seizure. The Court decided that the goods were, in point of fact, already lost by a peril of the seas prior to their seizure, and the insurers were accordingly held liable. "The goods," says the Court, "must have been destroyed but for the enemy, and the enemy took them, not to save, but to appropriate."

This case is the converse of *Green v. Elmslie, Peake*, 212 (cited under § 79), where the vessel, though driven ashore, was not exposed to sea perils, and while thus situated was seized and captured. (See *Ionides v. Universal Ins. Co.* 14 Com. B. N. S. 259.)

§ 80. *Where a peril is specially excepted in a contract of insurance, a loss which would not have occurred but for such peril is thereby excepted, although the immediate cause of the loss was a peril which was not excepted.*

Civ. Code Cal. 2623. N. Y. Civ. Code, 1433.

Loss by explosion.—A policy against fire provided "that the insurer would not be liable for any loss occa-

sioned by the explosion of a steam boiler." A fire occurred, which was caused by the explosion of a steam boiler on the insured property. The Court held, that such a loss came within the terms of the exception, and therefore that the insurer was not liable.

It was contended, on behalf of the plaintiff, that the loss in question was not "occasioned by the explosion of a steam boiler," but by fire resulting therefrom, and that as the loss was by fire, the insurer should be held liable.

But the Court say, in answer to this view of the construction of the exception: "It cannot be supposed that the clause was introduced to guard against a liability which could not by any possibility arise, but to guard against one which might arise but for the existence of this provision. The only one which could arise from the explosion of a steam boiler would be for an immediate loss or damage by fire occasioned or communicated by such explosion.

"If this loss was occasioned by the explosion, it would seem to be covered by the clause, whether the loss resulted from fire being directly communicated to the insured property, or from its being crushed into worthless fragments.

"A loss of the former nature was the only one which the company had any occasion to guard against. We think they have done this by the clause in question." *St. John v. American M. M. & F. Ins. Co.* 1 Duer, 371. See also *Hayward v. L. and L. F. & L. I. Co.* 7 Bosw. 385; 1 Kern. 516.

Where the policy contains a provision that the insurer shall not be liable for any loss occasioned by explosion, no recovery can be had for a loss by fire of which an explosion was the proximate cause. Where the explosion produces the fire by which the loss is caused, the insurer is not liable; but where a fire breaks out, and, as one of its results, produces an explosion, causing damage to the insured property, the insurer is not exempted from respon-

ability for such a loss, under the provision above stated. (*Briggs v. N. A. Ins. Co.* 53 N. Y. 447. See *Stanley v. Western Ins. Co.* Law R. 3 Ex. 71; and *United States L. F. & M. Ins. Co. v. Foote*, 22 Ohio St. 340.)

But in the case of the *Commercial Ins. Co. v. Robinson*, 64 Ill. 265, the Court maintained, that if the clause exempting the insured from liability "for any loss caused by explosions of any kind," is to be interpreted as if the words "by fire" were inserted after the word "loss," the result must be to exonerate the insurer from liability in all cases where the fire which injured or destroyed the property was produced by an explosion, however remote the locality of such explosion might be from the property in question. The great fire at Chicago, supposed to have been occasioned by the explosion of a lamp, was referred to by the Court as illustrating the difficulty of admitting such a construction of the clause as would restrict its operation to cases where the fire was merely a result of the explosion. "We must," remarked the Court, "either hold that the clause refers to loss by explosion, simply without reference to fire, or to losses by fire caused by explosions anywhere, whether on or remote from the premises. There is no middle course.

"It must receive one of these constructions or the other. One is consistent with the context, reasonable in itself, and just to both parties. The other requires the interpolation of two additional words in the policy, is inconsistent with the context, and in a large degree would make fire insurance a mere mockery. We cannot hesitate which construction to choose. But," say the counsel for the appellant, "this company does not profess to insure against losses by explosion, but only by fire, and the clause construed as we construe it is unmeaning, or at least useless. But not so. The clause was designed to apply to all cases where the explosion was the immediate cause of the loss." (See also *Boatman's F. & M. Ins. Co. v. Parker*, 23 Ohio St. 85.)

In the case of the Insurance Company v. Tweed, 7 Wall. 44, the policy excepted any loss or damage by fire which might happen to take place "*by means of any invasion, insurrection, riot, or civil commotion, or any military or usurped power, explosion, earthquake, or hurricane.*" The insurance was on bales of cotton in a building known as the Alabama Warehouse in Mobile.

The fire which caused the loss originated thus: An explosion, scattering combustible materials in the street, occurred in a building on the other side of the street, known as the Marshall Warehouse, the street between the two warehouses being fifty feet wide. A third building, known as the Eagle Mill, which was also separated from the Alabama Warehouse by a street fifty feet wide, and from the Marshall Warehouse by a space of over a hundred feet, was fired by this explosion. The wind, which was blowing from the Eagle Mill toward the Alabama Warehouse, carried the fire across a street eighty feet wide to the Alabama Warehouse. The fire was, however, a continuous affair from the explosion, and was under full headway in half an hour.

The Court decided that no new force or power, sufficient of itself to stand as the cause of the misfortune, had intervened between the explosion and the destruction of the property. "The explosion," remarks Mr. Justice Miller, who delivered the opinion of the Court, "undoubtedly produced or set in operation the fire which burned the plaintiff's cotton. The fact that it was carried to the cotton by first burning another building, supplies no new force or power which caused the burning. Nor can the accidental circumstance that the wind was blowing in a direction to favor the progress of the fire towards the warehouse be considered a new cause. That may have been the usual course of the breeze in that neighborhood. Its force may have been trifling. Its influence in producing the fire in the Alabama Warehouse was too slight to be substituted for the explosion as the cause of the fire."

The opinion concludes thus: "Without commenting further, we are clearly of opinion that the explosion was the cause of the fire in this case, within the meaning of the policy."

The plaintiff consequently failed to recover. It appears from the cases above cited that high authorities are at variance respecting the true construction of the clause declaring that the insurer shall not be liable for explosion, or for a loss by means of explosion: some insisting that the exception refers only to cases where the loss or damage is the direct result of an explosion; and others maintaining that it includes all cases where a fire produced by the explosion is the immediate cause of loss or damage.

Where gunpowder is exploded by fire, and the explosion damages the insured property, the insurer is not exonerated from liability by the clauses of the policy excepting losses by explosion. For as fire causes the explosion, the resulting injury is properly ascribed to the operation of that agency. "Where the effects produced are the immediate results of the action of a burning substance in contact with a building, it is immaterial whether these results manifest themselves in the form of combustion or explosion, or of both combined. In either case, the damage occurring is by the action of fire, and is covered by the ordinary terms of a policy against loss by fire." (*Scripture v. Lowell M. F. Ins. Co.* 10 Cush. 356.) Where the policy provides that the insurer shall not be liable for an explosion unless it produces fire, he will be liable for a fire which is indirectly the result of the explosion.

If the policy provides that the insurer shall not be liable for losses caused by explosion of any kind, unless fire ensues, and then only for the loss or damage by fire, the assured, in the event of a loss caused by an explosion from which fire ensues, will be entitled to recover only for those injuries which are the result of the fire. (*Briggs v. N. A. & M. Ins. Co.* 53 N. Y. 447.)

An explosion may be due to the contact of fire, in the literal sense of that term; as when explosive gases come in contact with a lighted candle or the flame of gas in a lamp, and yet the explosion is not, in such cases, caused by what is designated as "fire" in the policy. The flame of a candle or gas-burner, in use for domestic or business purposes, is not, under ordinary circumstances, a destructive agency in actual operation; but under abnormal conditions may become so, and the combustion which it then produces, as when it ignites a wall, shelf, ceiling, etc., comes under the insurance designation of "fire." (*Briggs v. N. A. & M. Ins. Co.* 53 N. Y. 447. See also *Washburn v. Western Ins. Co.* 9 Ins. Law J. 424; *U. S. Life Ins. Co. v. Foote*, 22 Ohio St. 340; *St. John v. Am. M. F. & M. Co.* 11 N. Y. 516; *Washburn v. Miami Valley Ins. Co.* 34 Am. Rep. 387; *Dows v. Faneuil Hall Ins. Co.* 127 Mass. 346.)

If the insured property is injured solely by a concussion produced by fire igniting powder at a distance, the loss is not attributable to fire, but to the concussion, and the insurer against loss by fire is not in such case responsible. (*Everett v. London Assurance Co.* 19 Com. B. N. S. 126; *Caballero v. Home Ins. Co.* 15 La. An. 217.)

Where insured property is intentionally destroyed by fire, in order to check the progress of a conflagration, such loss is within the usual terms of an ordinary fire policy, and the insurer is liable. (*City Ins. Co. v. Corlies*, 21 Wend. 367; *Greenwald v. Ins. Co.* 3 Phila. 323; *Phillips v. Protection Ins. Co.* 14 Mo. 220.)

A policy insuring against loss by fire will cover a loss by lightning, if the effect of the lightning is to fire or burn the insured property. When lightning operates as fire in the destruction it occasions, to that extent the insurer is liable. (See *Beaumont Ins.* 37.)

But where an ignition or combustion occurs, and the insurance is only against fire, including fire by lightning, the insurer will not be liable for injuries caused to the insured property by any other action of the lightning

than that of combustion or ignition. (*Babcock v. Montgomery Co. M. I. Co.* 6 Barb. 637; 4 Comst. 326; *Scripture v. Lowell M. F. I. Co.* 10 Cush. 361; *Kenniston v. Merri-mack Co. M. I. Co.* 14 N. H. 341; *Andrews v. Union M. I. Co.* 37 Me. 256.)

A loss caused by the ignition of gunpowder acting directly and immediately on the property insured is a loss "by fire." (*Scripture v. Lowell M. F. I. Co.* 10 Cush. 356; *Grim v. Phoenix Ins. Co.* 13 Johns. 451; *City F. I. Co. v. Corlies*, 21 Wend. 367; *Waters v. Merchants' L. I. Co.* 11 Peters, 225.)

§ 81. *An insurer is not liable for a loss caused by the willful act of the insured; but he is not exonerated by the negligence of the insured, or of his agents or others.*

Civ. Code Cal. 2629. N. Y. Civ. Code, 1434.

"The willful act of the insured."—If willful be construed as intentional merely, *quoad* the act in question, the above section does not contain a correct exposition of the law. The insured may, in entire good faith, intentionally do an act which may result in injury or loss to the property insured, as in the case of *Johnson v. Berkshire M. F. I. Co.* 4 Allen, 388, where the insured in endeavoring to smoke out a wasp's nest from a hole in his barn, by inserting a wisp of straw in the hole, and lighting it, negligently set fire to the building and destroyed it. His negligence, though the act was intentional, was held to be no defense to a suit on the policy.

The prevailing doctrine is, that acts of the assured or his agents, intentionally though negligently done, resulting in a loss to the insured property through the operation of the destructive agency insured against, do not preclude a recovery on the policy, in the absence of some provision to that effect, as in the case of *Savage v. Corn Exchange Ins. Co.* 4 Bosw. 1, and *Levy v. New Orleans M. I. Co.* 2 Woods, 63.

There are cases which speak of acts of negligence as

design or intent. Negligence on the other hand, there must be some act as will evince negligence. F. M. Co. 4 Al-
Barb. 119.)
If a person is negligent,
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a loss by the mere
where he has left the

property exposed to the peril, but has not co-operated directly or indirectly with those who produced the loss. Design imports plan, scheme, intention, carried into effect. The loss to be by design of the assured, in the sense of the policy, must be by incitement, connivance, or co-operation of the assured, directly or indirectly, with the persons who were agents in the act. It is not sufficient that he is negligent in leaving the premises derelict, and thus exposing them to the wanton or criminal acts of intruders. Negligence is not design. We are here, as in other cases of insurance, to look, not to the remote cause, but to the proximate cause of the loss—*causa proxima non remota spectatur*. How can it be truly said that the negligence of the plaintiff was, in any just sense, the proximate cause of the loss, if he had no co-operation, knowledge, or part in the act? Unless, then, the jury can from the evidence clearly see that the plaintiff was not merely negligent, but was directly or indirectly connected with the act, I am of opinion that it cannot be correctly deemed a loss by design of the assured. The defendants do not themselves impute to the plaintiff active co-operation or connection with the persons who set the house on fire. On the contrary, the argument supposes that it was set on fire by mere transgressors or felons, who were utter strangers to him, and of whose designs he was ignorant. It imputes to him only negligence, and wishes or motives for the event, and undue exposure to the perils. . . .

“Legal design, it is said, is to be imputed to a party where the consequences naturally flow from the act. That is true; but then, they must naturally flow from it, not merely follow it. They must be connected with it as a cause, not as an occasion. The act and the negligence must be knit together by an indissoluble bond. The law properly holds that every man is presumed to intend what are the natural consequences of his act. But it does not presume that he intends everything which

may possibly flow from his negligence, or be remotely occasioned thereby."

In the case of *Chandler v. Worcester M. F. I. Co.* 3 Cush. 328, the defendant's counsel admitted, on the trial, that there was no fraudulent design to set fire to the building insured, and declared that no evidence of that sort would be offered. They proposed, however, to show, and rely on as a defense, the gross negligence and carelessness and gross misconduct of the plaintiff as the cause of the loss. This evidence was excluded, as not tending to establish any grounds of defense, and the plaintiff recovered a verdict.

The appellate Court (Shaw, C. J.) says: "How this misconduct was to be shown, and in what acts it consisted, is not stated. The question then is, whether there can be any misconduct, however gross, not amounting to a fraudulent intent to burn the building, which will deprive the assured of his right to recover. We think there may be. By an intent to burn the building, we understand a purpose manifested, and followed by some act done, tending to carry that purpose into effect, but not including a mere non-feasance. Suppose the insured, in his own house, sees the burning coals in the fireplace roll down onto the wooden floor, and does not brush them up, this would be mere *non-feasance*. It would not prove an intent to burn the building, but it would show a culpable recklessness and indifference to the rights of others. Suppose the premises insured should take fire, and the flames begin to kindle in a small spot which a cup of water would put out, and the assured has the water at hand but neglects to put it on, this is mere *non-feasance*; yet no one would doubt that it is culpable negligence, in violation of the maxim, *sic utere tuo ut alienum non lædas*."

The verdict was therefore set aside, and a new trial ordered. The result of this decision is, that mere non-feasance on the part of the assured in preventing loss to or destruction of the insured property may, independently

of the breach of any express warranty on that point, be of so culpable and mischievous a character as to forfeit his rights under the policy.

The Supreme Court of New Hampshire, in *Hutchins v. People's M. F. I. Co.* 31 N. H. 248, after citing the foregoing extract from 3 Cush. 328, remarks: "This case does not weaken the position that negligence or carelessness is not a defense to an action upon a policy of insurance."

It seems, as the general result of the authorities, that, in the absence of some stipulation to the contrary in the policy, the insurer is liable for a loss caused proximately by the operation of the peril insured against where such operation was induced by an act or omission of the assured (not violating any warranty in the policy), found by a court or jury to have been merely negligent and free from any intent that such act or omission should result in loss or injury to the insured property.

But when the loss is the direct result of the fault of the assured or his agent, that is to say, of some act of the assured or his agent in violation of a positive law, it has been held that the insurer is not liable. (*Levi v. N. O. Ins. Ass.* 2 Woods, 63.)

In respect to the latter clause of § 81, it must be borne in mind that, if through the negligence of the assured or his agents a warranty is violated, no recovery can be had on the policy. The section refers to a case where the policy is in force up to the time of the loss.

ARTICLE X.

NOTICE OF LOSS.

- § 82. Notice of loss.
- § 83. Preliminary proofs.
- § 84. Walvers of defects in notice, etc.
- § 85. Walver of delay.
- § 86. Certificate, when dispensed with.

· § 82. *In case of loss upon an insurance against fire, an insurer is exonerated, if notice thereof be not given to him by*

some person insured or entitled to the benefit of the insurance, without unnecessary delay.

Civ. Code Cal. 2633. N. Y. Civ. Code, 1435.

Policies against fire usually contain a provision requiring the insured to give notice "forthwith," or "immediately," to the insurer, in case of loss. These and similar expressions are construed by the Courts, not in their literal sense, but as requiring notice to be given with all reasonable promptitude, regard being had to the circumstances of each particular case. (*Edwards v. Baltimore Ins. Co.* 3 Gill, 176; *St. Louis Ins. Co. v. Kyle*, 11 Mo. 278; *Provident Ins. Co. v. Baum*, 29 Ind. 236; *Phillips v. Protection Ins. Co.* 14 Mo. 220; *Schenck v. Mercer Co. M. I. Co.* 4 Zab. 447; *Peoria Ins. Co. v. Lewis*, 18 Ill. 553; *West Branch Ins. Co. v. Helfenstein*, 40 Pa. St. 289; *N. Y. Central Ins. Co. v. National Ins. Co.* 20 Barb. 468.)

But notice of loss may be waived by any act or declaration on the part of the insurer indicating that it is unnecessary. In the case of *Inland Ins. Co. v. Stauffer*, 33 Pa. St. 397, a fire occurred 9th April, 1857. The following morning notice was given to a director of the Company, who returned with the messenger and inspected the ruins. While there, talking of the policy, this director promised the assured that he would notify the company; that he should go to town (where the office of the company was) next day, or on the following Monday. There was no direct evidence that he did so; but a few days afterward the president and another director went to the scene of the fire, representing that they came from the company. No complaint was then made that notice had not been given. On the 20th April, formal written notice of loss was given by the assured to the company. Suit was afterwards brought on the policy, and objection was made that no sufficient notice of loss had been given in proper time. The Court held that it was for the jury to determine whether or not, under the circumstances stated, notice of loss had been waived. The Court say: "It is

no new doctrine that insurers may waive objection to a defective compliance with such a stipulation, or entire non-compliance; and that such waiver, in effect, strikes the condition out of the contract. Nor need the waiver be express. It may be inferred from acts of the insurers evidencing a recognition of liability, or even from their denial of obligation exclusively for other reasons. (1 Cush. 257; 6 Cush. 342; 1 Dutch. 178; 9 How. 390.)"

See also *Roumage v. Mechanics'* F. I. Co. 1 Green, 110; *Phillips v. Protection I. Co.* 14 Mo. 220; *West Branch I. Co. v. Helfenstein*, 40 Pa. St. 289; *Drake v. Farmers' U. I. Co.* 3 Grant Cas. 325; *Blake v. Exchange M. I. Co.* 12 Gray, 266.

If prior to the receipt of notice, or after the receipt of a defective notice, and while there is yet time to amend it, the insurer denies all liability under the policy, or refuses to pay on other grounds than the want of sufficient notice of loss, he is deemed to have waived objection on that score. (*Tayloe v. Merchants' Ins. Co.* 9 How. 390; *Francis v. Ocean I. Co.* 6 Cowen, 404; *O'Neil v. Buffalo I. Co.* 3 N. Y. 122; *Martin v. Fishing I. Co.* 20 Pick. 389; *Heath v. Franklin I. Co.* 1 Cush. 257, 264; *Vos v. Robinson*, 9 Jolins. 192; *Thwing v. Great Western I. Co.* 111 Mass. 110; *Underhill v. Agawam I. Co.* 6 Cush. 445. See the elaborate note to *Phoenix Ins. Co. v. Stevenson*, 8 Ins. Law J. 930.)

A positive refusal to pay on the merits of the case has been held to waive the condition that the loss shall not be payable until a stated time (usually sixty days) after service of proofs of loss. (*Phillips v. Protection Ins. Co.* 14 Mo. 220; *Norwich & N. Y. Ins. Co. v. Western Mass. Ins. Co.* 34 Conn. 561; 6 Blatchf. 241; 12 Wall. 194; *Allegre v. Maryland Ins. Co.* 6 Har. & J. 408.)

§ 83. *When preliminary proof of loss is required by a policy, the insured is not bound to give such proof as would be necessary in a court of justice; but it is sufficient for him to give the best evidence which he has in his power at the time.*

Civ. Code Cal. 2634. N. Y. Civ. Code, 1436.

The policy usually specifies what the proofs of loss must contain. As the production of these proofs to the insurer, prepared in conformity with the requirements of the policy, is a condition precedent to the right of recovery by the assured, it is important that these requirements should be punctually and exactly fulfilled.

Proofs by whom furnished.—Thus, as a general rule, where the proofs are to be furnished by the assured, they cannot be furnished by a substitute. (*Ayres v. Hartford F. I. Co.* 17 Iowa, 176; *Kernochan v. New York B. F. I. Co.* 17 N. Y. 433; *Sims v. State Ins. Co.* 47 Mo. 54.)

But if circumstances render it necessary or proper that the insurer should receive proofs furnished by another party than the assured in person, the rule is not strictly enforced. (*Sims v. State Ins. Co.* 47 Mo. 54; *N. W. Ins. Co. v. Atkins*, 3 Bush, 328; *O'Connor v. Hartford Ins. Co.* 31 Wis. 160.)

Proofs must conform to the requirements of the policy.—The proofs must be as full and particular as the terms of the policy require, unless a sufficient excuse is shown for the omission to make them so. (*Wellcome v. Peoples' Eq. M. F. Ins. Co.* 2 Gray, 480; *Beatty v. Lycoming Ins. Co.* 66 Pa. St. 9; *Lycoming I. Co. v. Updegraff*, 40 id. 311; *Bumstead v. Dividend M. I. Co.* 2 Kern. 81.) This last case contains an elaborate discussion respecting the proper construction of the clauses requiring the assured, in fire policies, to render a particular account of the loss and damage sustained, with vouchers, etc.

In the case of *Blakely v. Phoenix Ins. Co.* 20 Wis. 205, the Court rigorously enforced a literal compliance with a condition in the policy which required the assured, in his proofs of loss, to give copies of the written portions of any other existing policies on the same property. The assured stated in his preliminary proofs the fact that there was another policy outstanding on the property, giving its amount, and, according to his belief, its date and number, and adding that the policy had been mislaid, and

that the secretary of the company said he had no record of the written portion of it. Objection was seasonably made to the proofs on account of the omission. Suit was brought on the policy, and the omission was held fatal to a recovery. (Compare *Hynds v. Schenectady Ins. Co.* 11 N. Y. 554; *O'Brien v. Commercial Ins. Co.* 63 id. 112; *Sims v. State Ins. Co.* 47 Mo. 54; *Bumstead v. Dividend M. I. Co.* 2 Kern. 81.)

The general rule of law governing the construction of conditions of this character in policies of insurance is well stated in the last-cited case (2 Kern. 92): "The construction of these conditions should be reasonable, and as near the apparent intent of the parties as may be consistent with the terms employed, taking into consideration the motives that led to their insertion in the contract, and the object intended to be effected by them. It was not practicable for the parties to provide for every case which might arise; but they could and did provide in general terms for ordinary cases, and having done so, extraordinary cases and exceptions were necessarily left to be decided on the general principles which they prescribed for those most likely to happen. Ordinarily, the books of the insured might be preserved and capable of production at the call of the insurer; and hence their production, if called for, was a condition precedent to the liability of the underwriter. This clause should not, however, be so construed as to require a party to produce books which he had not, and which, without fault on his part, he could not produce. So, if all means of making an accurate inventory of the property destroyed were lost, the condition should be so construed as only to require the best and most perfect statement which the party could make. This class of conditions, annexed to and making part of contracts of insurance, has always been liberally construed as requiring only good faith on the part of the assured, and the best evidence of the loss which he could give, and so as to secure to the insurer all the substantial benefits of the conditions."

To the same effect: *Walsh v. Washington M. Ins. Co.* 32 N. Y. 427; *Franklin Ins. Co. v. Culver*, 6 Ind. 137. A simple notice of loss is no proof of loss, and an omission to notify the party that such notice is not proof is no waiver of the condition. (*O'Reilly v. Guardian M. L. I. Co.* 60 N. Y. 169.)

§ 84. *All defects in a notice of loss, or in preliminary proof thereof which the insured might remedy, and which the insurer omits to specify to him, without unnecessary delay, as grounds of objection, are waived.*

Civ. Code Cal. 2635. N. Y. Civ. Code, 1437.

The law has long been well settled in conformity with the text of this section, so far as respects mere informalities or omissions. (*McMasters v. Westchester Co. M. I. Co.* 25 Wend. 379; *Bodle v. Chenango C. M. I. Co.* 2 Comst. 53; *Firemens' Ins. Co. v. Crandall*, 33 Ala. 9; *Francis v. Somerville M. I. Co.* 1 Dutch. 78; *Harris v. Phoenix Ins. Co.* 35 Conn. 310.)

So a payment on account of the loss, or a refusal to pay exclusively on the merits of the claim, is deemed a waiver of objection to preliminary proofs. (*McMasters v. Westchester Co. M. I. Co.* 25 Wend. 379; *Globe Ins. Co. v. Boyle*, 21 Ohio St. 119; *Westlake v. St. Lawrence C. M. I. Co.* 14 Barb. 206; *Doll's Case*, 35 Md. 89, 101; *Underhill v. Agawam M. I. Co.* 6 Cush. 440; *Deford's Case*, 38 Md. 382; *Peoria M. & F. Ins. Co. v. Lewis*, 18 Ill. 553; *Rathbone v. City Fire Ins. Co.* 31 Conn. 194; *West Rockingham Co. v. Sheets*, 26 Gratt. 854; *St. Louis Ins. Co. v. Kyle*, 11 Mo. 278; *Norwich and N. Y. Trans. Co. v. Western Mass. Ins. Co.* 6 Blatchf. 241, 252.)

§ 85. *Delay in the presentation to an insurer of notice or proof of loss is waived, if caused by any act of his, or if he omits to make objection promptly and specifically upon that ground.*

Civ. Code Cal. 2636. N. Y. Civ. Code, 1438.

See *Ames v. N. Y. Union Ins. Co.* 4 Kern. 253. If the

proofs are not produced in season, and no objection is made on that or any other specific ground, but the company, when payment is demanded, simply refuses to pay, is the company precluded from setting up the omission to furnish proofs of loss within the time prescribed by the policy? According to the terms of this section, the delay is waived. But why should it be held to be waived? Why should the insurer be estopped from setting it up? He has not prejudiced the position of the insured by omitting to tell him, when his proofs were presented, that they were too late, and that therefore the company would decline to pay. Suppose he had told him so, it would have been too late to repair the error, as the cause of action on the policy was already lost by the delay. Why should the mere silence of the insurer revive a policy practically void?

In *Brink v. Hanover Ins. Co.* 70 N. Y. 594, it was held by the Court of Appeals as follows: "If proofs were not served in time, and the insurer had done nothing to induce the omission, and so the assured had lost all rights under the policy, the fact that thereafter defendant refused to pay, without assigning any reason, or only assigning one of many, did not amount to a waiver, and did not estop it from insisting upon any other defenses, on peril of losing those not specified. (*Diehl v. Adams Co. Mut. Ins. Co.* 58 Penn. 542; *Trask v. Ins. Co.* 29 id. 198; *Patrick v. Ins. Co.* 43 N. H. 621; *Beaty v. Ins. Co.* 66 Penn. 9; *Bennett v. Lycoming Co. M. I. Co.* 67 N. Y. 274; *Underwood v. Farmers' Joint Stock Ins. Co.* 57 id. 500.)"

But a still later decision by the same Court holds that if the company intends to avail itself of the technical objection that proofs are not filed in time, common fairness requires that it should refuse to receive them on that ground, or at least promptly notify the assured of their determination, otherwise the obligation should be regarded as waived. (*Brink v. Hanover Ins. Co.* 80 N. Y. 109, 115.)

§ 86. *If a policy requires, by way of preliminary proof of loss, the certificate or testimony of a person other than the insured, it is sufficient for the insured to use reasonable diligence to procure it, and in case of the refusal of such person to give it, then to furnish reasonable evidence to the insurer that such refusal was not induced by any just grounds of disbelief in the facts necessary to be certified.*

Civ. Code Cal. 2637. N. Y. Civ. Code, 1439.

This section was designed to prevent the hardship that has sometimes been experienced, owing to the inability of the assured to obtain a magistrate's certificate in respect to the loss, as usually required by one of the conditions of an ordinary fire policy.

See *Johnson v. Phoenix Ins. Co.* 112 Mass. 49, holding that the condition must be strictly complied with, citing and reviewing many cases.

Also *Turley v. N. A. F. I. Co.* 25 Wend. 374, holding that a substantial compliance is sufficient.

ARTICLE XI.

DOUBLE INSURANCE.

§ 87. Double insurance.

§ 88. Contribution in case of double insurance.

§ 87. *A double insurance exists where the same person is insured by several insurers separately in respect to the same subject and interest.*

Civ. Code Cal. 2641. N. Y. Civ. Code, 1440.

Mr. Phillips, 1 Ins. § 359, uses the term "double insurance" as synonymous with over-insurance, and states that it exists where two or more insurances are made in favor of the same assured, on the same interest, in the same subject, against the same risks. Mr. Parsons, 2 Mar. Law, 100, states "that there is no double insurance or over-insurance unless all the policies insure the very same subject-matter against the same risks, and the whole amount exceeds the value of the whole subject-matter."

"A double insurance," says Park, "is where the same man is to receive two sums instead of one, or the same sum twice over, for the same loss, by reason of his having made two insurances upon the same goods or ship. . . . Where a man has made a double insurance he may recover his loss against which of the underwriters he pleases, but he can recover for no more than the amount of his loss." (Park Ins. 373.)

It is not necessary, in order to constitute a case of double insurance, that the different policies should be held by the same person. Thus, where warehousemen insured goods in their warehouses, "their own, or held by them in trust, or in which they have an interest or liability," and policies had been issued on the same goods to parties who had made advances on them, the case was held to be one of double insurance. (*Home Ins. Co. v. Baltimore Ins. Co.* 3 Otto, 527.)

An insurance by mortgagor and mortgagee respectively, of their interests in the mortgaged property, is not double insurance. (*Woodbury Bank v. Charter Oak Ins. Co.* 31 Conn. 517; *Holbrook v. Am. F. Ins. Co.* 1 Curt. 193.) To constitute double insurance, the interests insured must be identical. (*Perkins v. N. E. Mar. Ins. Co.* 12 Mass. 215.)

§ 88. *In case of double insurance, the several insurers are liable to pay losses thereon as follows:*

1. *In fire insurance, each insurer must contribute ratably toward the loss, without regard to the dates of the several policies;**
2. *In marine insurance, the liability of the several insurers for a total loss, whether actual or constructive, where the policies are not simultaneous, is in the order of the dates of the several policies: no liability attaching to a second or other subsequent policy except as to the excess of the loss over the*

* The observance of this rule is usually secured by a stipulation contained in the policy: see *Lucas v. Jefferson Ins. Co.* 6 Cowen. 635; *Hygum v. Aetna Ins. Co.* 11 Iowa, 21; *Haley v. Dorchester M. F. I. Co.* 12 Gray, 545; 1 Allen, 536.

amount of all previous policies on the same interest. If two or more policies bear date upon the same day, they are deemed to be simultaneous, and the liability of insurers on simultaneous policies is to contribute ratably with each other. The insolvency of any of the insurers does not affect the proportionate liability of the other insurers. The liability of all insurers on the same marine interest for a partial or average loss is to contribute ratably.

Civ. Code Cal. 2642. See N. Y. Civ. Code, 1441.

As to subdivision 1 of the above section, at common law, if the policy contains no provision restricting the liability of the insurer, the party insured may recover on any one or more outstanding policies on the same property to the extent of his loss. He may obtain judgment on each policy, but can recover only one satisfaction. (*Lucas v. Jefferson Ins. Co.* 6 Cowen, 635.) But where one of several policies contains a condition that the insurer shall only be liable for such a proportion of the loss as the sum insured under such policy bears to the entire amount insured, a recovery on such policy must be restricted to this proportionate amount. Any one of several insurers who is liable, under his policy, to a judgment for the entire amount of the loss, is entitled, on payment of the loss, to contribution from the other insurers for any excess which he may pay beyond his proportion. (*Thurston v. Koch*, 4 Dall. 348; *Newby v. Reed*, 1 Black. W. 416; *Sloat v. Royal Ins. Co.* 49 Pa. St. 14.) Where he is only liable, by the express terms of his policy, for his *pro rata* portion of the loss, he is not justified in paying anything beyond this, and then calling on the other insurers for contribution. (*Lucas v. Jefferson I. Co.* 6 Cowen, 635; *Fitzsimmons v. City F. I. Co.* 18 Wis. 234.)

Marshall, whose work was published in 1802, remarks, that "at present the underwriters upon a policy in which there is an over-insurance would be held all liable in proportion to their several subscriptions, without any regard to priority of dates." The same rule seems to have

prevailed in France, owing, however, to the fact that the contract of each underwriter on the policy always bore the same date, without regard to the actual priority in point of time. "If," says Emerigon, "the policy included various dates, each date would form an individual instrument, and would fix the lot of each of the insurers. But policies among us having only a single date; he who signs last is upon the same footing with the others." (Meredith's Emerigon, ch. 16, § 4.)

But the French Code of Commerce, art. 359, adopts substantially the rule as laid down in the first sentence of subsection 2 of section 88, above cited. This subsection also embodies the substance of what is known in marine insurance as the American clause. (See notes to § 77.) The liability of successive insurers, by the common law of England, in case of double insurance, seems to have been originally the same as that which is here declared. (*The African Co. v. Bull*, 1 Show. 132; *Malyne's Lex Merc.* 112.)

But Lord Mansfield laid down a different rule (*Newby v. Reed*, 1 Black. W. 416), holding that, in case of over-insurance, the different sets of policies constitute but one insurance, and are good to the extent of the value of the effects put at risk. The assured can select any of the policies and recover on it (if sufficient in amount) to the full extent of his loss, leaving the underwriter on that policy to recover from the other underwriters their *pro rata* proportions.

American clause.—According to this rule, the respective insurers were made guarantors each for the other, so that the insurer who was obliged to pay the entire loss, or more than his proportion of it, might find himself, in case of the insolvency of his co-insurers, without any effectual means of indemnity. To remedy this and other inconveniences which the rule was found to have introduced, the proviso known as the American clause was inserted in American marine policies. The American clause, as de-

scribed in *The American Ins. Co. v. Griswold*, 14 Wend. 501, is as follows: "It is further agreed, that if the assured shall have made any other assurance upon the premises, prior in date to this policy, the assurers shall be answerable only for so much as the amount of such prior insurance shall be deficient"; and that, "in case of any subsequent insurance, the insurer shall nevertheless be answerable for the full extent of the sum subscribed by him, without right to claim contribution from subsequent insurers." (See also *Seaman v. Loring*, 1 Mason, 128.)

The rule thus introduced seems to have been a substantial adoption of § 359 of the French Code of Commerce, which provides that if there exist several contracts of insurance, made without fraud, on the same merchandise, and the first contract insures the entire value of the property, it alone will be considered as existing. The insurers who have signed the subsequent policies are discharged; they receive but half per cent. on the sum insured. If the entire value of the merchandise is not insured by the first contract, the insurers who have signed the subsequent contracts are regarded as insuring the excess (*respondent de l'excédant*), according to the order of the date of their contracts.

Partial losses how paid in double insurance.—

In all cases of double insurance, partial losses on the subject insured are paid by each insurer, *pro rata*. See Code de Commerce, art. 360, declaring the same rule. Thus, in the case of *Whiting v. The Independent Mutual Insurance Co.* 15 Md. 311, the insured vessel was valued in each policy at \$22,000. The policies were as follows:

Sun Mutual, March 15, 1854, \$7,300; Independent M. I. Co. March 16, 1854, \$7,400; Commercial M. Co. March 17, 1854, \$7,300. Each policy contained the American clause. The vessel sustained a loss of \$2,189.04. Suit was brought against the Independent M. I. Co., to recover $\frac{7,400}{22,000}$ of this amount. The company insisted that the first insurer, the Sun Mutual Ins. Co., was, by reason of the American

clause, liable to pay the entire amount without contribution from the other insurers.

The Court, after stating that it was clearly of opinion that the terms of the American clause applied only to cases of double insurance, proceeded to remark as follows: "In the first part of the clause the stipulation is, that if there be a prior insurance, the underwriter shall not be answerable on a subsequent policy, except so far as the amount at risk may remain uninsured by the previous insurance; that is, if the prior policy is sufficient in amount to cover the whole value of the thing at risk, then the subsequent policy does not attach, the underwriter is at no risk, and the premium is to be returned. So far as the amount at risk remains uncovered by prior insurance, a subsequent policy does attach, and the second underwriter is *pro tanto* liable upon his policy, and entitled *pro tanto* to retain the premium.

"It will be observed that the stipulation is not that the underwriter is to be exempt from liability if there has been prior insurance to an amount sufficient to cover the loss, but that he is not answerable at all upon his contract, unless there be something to which his policy can attach remaining uncovered by prior insurance.

"When we look at the latter part of the clause, which provides for the case of a subsequent insurance, the meaning of the whole is alike clear and free from difficulty.

"In that it is stipulated that in case of any subsequent insurance, the underwriter shall remain answerable for the amount underwritten, without right to claim contribution from such subsequent assurers, and shall accordingly be entitled to retain the premium received, '*in the same manner as if no subsequent insurance had been made.*'

"These last words, which we have italicized, qualify the whole sentence, and are a key to its construction. If in the case before us there had been no policy on the ship except the first (that of the Sun Mutual Ins. Co.), it is clearly settled that the liability of that company would

have been for only $\frac{7,300}{22,000}$ of the loss. The owner, not having any other insurance, would stand as his own insurer for that portion of the value of the ship remaining uncovered by the policy, and the loss, whether partial or total, would be apportioned between him and the underwriter. The relation between the assurer and the assured is not changed when the latter obtains a subsequent assurance, thereby substituting another underwriter for himself as to that portion of the thing at risk which is not covered by the first policy."

According to the construction contended for by the appellee, the Sun Mutual Ins. Co. would be rendered liable for the whole loss only in consequence of there being a subsequent insurance, which is directly in the face of the words of the contract that it "shall be answerable in the same manner as if no such subsequent assurance had been made." The Independent M. I. Co. was accordingly held liable for $\frac{7,400}{22,000}$ of the partial loss sustained.

In the case of the Baltimore Fire Ins. Co. v. Lovey, 20 Md. 20, the plaintiff insured in this company his own goods in a certain building, to the amount of \$16,000. The policy contained the usual *pro rata* clause. The property was totally destroyed by fire.

At the time of the loss the assured had effected insurance with certain foreign companies on goods, whether his own or held in trust or on commission, to the amount of \$65,000. This policy included in terms the goods already insured in the first-mentioned policy. The entire property thus insured amounted to over \$88,000, and was totally destroyed by fire.

The insurers on the policies for \$65,000 paid up their loss. The goods insured, "held in trust or on commission," exceeded that amount in value. The company issuing the policy for \$16,000, being sued, insisted that, under the *pro rata* clause, it was only liable to pay such a proportion of the loss as the amount insured by it bore to the total amount insured.

The Court held that the object of insurance is indemnity to the assured; and that the language of a policy should not be so construed as to defeat this object. As the \$65,000 paid by the insurers made good the losses only on the insured goods held in trust or on commission, the goods belonging to the insured were virtually left unprotected by that insurance. If the insurer on the \$16,000 policy was to be held liable for only a portion of the loss on that policy, the assured would be deprived of that indemnity to which he was entitled. As the other insurers had paid their loss in full, it was evident they could not be called on for contribution. As to the goods belonging to the insured, the Court decided that the case was not one of double insurance; and the insurer on the \$16,000 policy was held liable for that amount.

In *Ogden v. The East River Ins. Co.* 50 N. Y. 389, plaintiff had insured with this company \$3,000 on his stock in trade, amounting to \$16,000, in a designated building. The policy contained the usual *pro rata* clause as to extent of liability in case of other insurance.

The property was totally destroyed by fire, and with it a large amount of other property belonging to the plaintiff, the whole amounting to \$88,000, and the whole having also been insured, and being insured at the time of the fire, in other offices, to the amount of \$47,500.

The defendant, being sued for \$3,000, claimed that it was only liable for its proportion of that amount of loss.

The Court, in delivering its opinion, says: "If the entire property is destroyed, as in this case, the rule laid down in 2 Phillips on Insurance, p. 56, No. 1263 *a*, and in *Blake v. Exchange M. Ins. Co.* 12 Gray, 265, carries out the intent of the clause, and works entire equity between the insurers and the insured, as well as between the several insurers. That rule is, in substance, that, for the purpose of apportioning the loss in case of over-insurance, where several parcels are insured together by one policy for an entire sum, and one of the parcels is insured sepa-

rately by another policy, the sum insured by the first-mentioned policy is to be distributed among the several parcels in the proportion which the sum insured by that policy bears to the total value of all the parcels. Thus, in round numbers, the sum insured in this case by the policies other than defendant's, on the property as an entirety, was \$47,000. The total value of the property covered by these policies was \$88,000. In case of a total loss, each parcel should be deemed insured thereby for $\frac{47}{88}$ of its value. The parcel separately insured by the defendant was worth \$16,000, and was insured by the defendant for \$3,000, which was equal to $\frac{3}{16}$ of its value. It is manifest that there was no over-insurance, and that consequently there is no occasion for any apportionment."

The decision in this case differs from and overrules that in *Howard Ins. Co. v. Scribner*, 5 Hill, 298, in which it was held, that where a specific parcel of property is insured by one policy, and the same property is insured by another policy which also includes other property, in determining whether the case is one of double insurance, the latter policy is to be wholly thrown out of view, so that such a case is not one of "other insurance," within the meaning of that term as used in the *pro rata* clause of the policy. (See also *Ogden v. East River Ins. Co.* 50 N. Y. 388.)

The principle of ratable apportionment among different insurers of the same property is only applicable to cases where the amount of the loss is less than the amount of insurance on the property. When the loss is greater than the whole amount insured, each insurer pays in full. (*Phillips v. Perry Ins. Co.* 7 Phila. 673.)

Rights of subsequent insurers.—A prior insurance cannot be canceled by agreement between the underwriter and the assured, to the prejudice of a subsequent underwriter, who undertook only to be liable for so much as the amount of such prior insurance might be deficient toward fully covering the property at risk. (*Macy v.*

Whaling Ins. Co. 9 Met. 354; *Seaman v. Loring*, 1 Mason, 128.)

But where a policy contains a clause which provides that in case of loss the insured shall not recover more than the proportion thereof which the amount thereby insured bears to the whole amount of insurance on the property, the party accepting such policy is under no obligation to continue in force any insurance already existing on the property at the time of the acceptance of such policy. He may cancel or discontinue it as he pleases; and if when a loss occurs under the policy so accepted, the prior insurance has ceased to exist, so that there is no other insurance on the property, the insurer is liable to the same extent as if the prior insurance had never existed. (*Hand v. The Williamsburgh City F. I. Co.* 57 N. Y. 41.)

Although in France the liability of successive insurers is, by article 359 of the Code de Commerce, similar to that provided for by the American clause, it has been there decided, in the case of successive policies on goods, that, if prior to the loss the first policy be canceled in good faith, the insurer is liable on the second policy to the same extent as if the first had never existed. (Note by Rogron to § 359 Code de Commerce.)

ARTICLE XII

REINSURANCE.

§ 89. Reinsurance, what.

§ 90. Disclosures required.

§ 91. Reinsurance presumed to be against liability.

§ 92. Original insured has no interest.

§ 89. *A contract of reinsurance is one by which an insurer procures a third person to insure him against loss or liability by reason of such original insurance.*

Civ. Code Cal. 2846. N. Y. Civ. Code, 1442.

In *Mackenzie v. Whitworth*, Law R. 10 Ex. 142, 1 Ex. D. 36, it was held that an underwriter on "goods" may reinsure his risk by the same description.

It was admitted that in all cases of reinsurance policies it had been the invariable practice to disclose the fact that the policy was for reinsurance. It was proved that plaintiff, at the time of effecting insurance, knew that such was the nature of the policy, but did not disclose it. The defendant testified that he would not have accepted the risk had he known its real character. Evidence was given on both sides as to whether the alleged concealment was material. The jury found it was not. The question therefore presented to the Court was whether the assured in a reinsurance policy "on goods" could recover the loss he had sustained as an original insurer on the goods. It was held that he could, and the Exchequer Chamber affirmed the judgment on appeal. The Court intimated that the rule laid down in *Glover v. Black*, 3 Burr. 1394, if correct, was not to be extended. (Compare § 48, subds. 3, 4.)

§ 90. *Where an insurer obtains reinsurance, he must communicate all the representations of the original insured, and also all the knowledge and information he possesses, whether previously or subsequently acquired, which are material to the risk.*

Civ. Code Cal. 2647. N. Y. Civ. Code, 1443.

The risk insured against in a contract of reinsurance is the probability that the original insurer will be called on to pay a loss on the policy which he has issued. Everything, therefore, to the same extent as in a contract of insurance, tending to affect the estimate of this probability, should be disclosed to the party proposing to become the reinsurer. He should not only be put in possession of all the information received by the original insurer at the time of issuing the policy, in respect to the risk, but of all that he may since have acquired.

In the case of the *New York Bowery Ins. Co. v. New York Fire Ins. Co.* 17 Wend. 359, the defendant, after issuing its policy, learned that the assured was a man of bad

reputation, and had burned one or two houses. The company obtained insurance against its risk on this policy from the N. Y. Bowery Ins. Co., without disclosing what it had learned of the reputation of the assured. The reinsurance was held void by reason of this concealment. (See also *Ocean Ins. Co. v. Sun Ins. Co.* 8 Ben. 272.)

§ 91. *A reinsurance is presumed to be a contract of indemnity against liability, and not merely against damage.*

Civ. Code Cal. 2648. N. Y. Civ. Code, 1444.

An indemnity against liability becomes operative as soon as the party indemnified becomes liable to pay the debt or discharge the obligation to which the indemnity refers. Hence the original insurer, when sued on his policy, may either give notice to the reinsurer to defend the suit at the cost and expense of the latter, or, where there is no ground of defense to the demand on the policy, he may pay the loss and claim compensation of the reinsurer. (*Hone v. Mutual Safety Co.* 1 Sand. 148; 2 Comst. 235; N. Y. Central Ins. Co. v. Nat. Prot. Ins. Co. 20 Barb. 468; *Eagle Ins. Co. v. Lafayette Ins. Co.* 9 Ind. 443; *Blackstone v. Allemania Ins. Co.* 4 Daly, 299; 56 N. Y. 104.)

§ 92. *The original insured has no interest in a contract of reinsurance.*

Civ. Code Cal. 2649. N. Y. Civ. Code, 1445.

(*Herckenrath v. Am. M. Ins. Co.* 3 Barb. Ch. 63; *C. & C. Comm. Ins. Co. v. Marine Ins. Co.* 1 Bosw. 152; *Meredith's Emerigon*, chap. 8, § 14.)

CHAPTER II.

MARINE INSURANCE.

ARTICLE I. DEFINITION OF MARINE INSURANCE, § 93.

II. INSURABLE INTEREST, §§ 94-100.

III. CONCEALMENT, §§ 101-104.

IV. REPRESENTATIONS, §§ 105, 106.

V. IMPLIED WARRANTIES, §§ 107-114.

VI. THE VOYAGE, AND DEVIATION, §§ 115-120.

VII. LOSS, §§ 121-131.

VIII. ABANDONMENT, §§ 132-143.

IX. MEASURE OF INDEMNITY, §§ 149-159.

ARTICLE I.

DEFINITION OF MARINE INSURANCE.

§ 93. Marine insurance, what.

§ 93. *Marine insurance is an insurance against risks connected with navigation, to which a ship, cargo, freightage, profits, or other insurable interest in movable property may be exposed during a certain voyage or a fixed period of time.*

Civ. Code Cal. 2655. N. Y. Civ. Code, 1446.

"Perils of the sea," as understood in the usual contract of a common carrier by water, are thus enumerated in § 2199 of the Civil Code of California.

Perils of the sea are from—

1. Storms and waves;
2. Rocks, shoals, and rapids;
3. Other obstacles, though of human origin;
4. Changes of climate;
5. The confinement necessary at sea;
6. Animals peculiar to the sea; and
7. All other dangers peculiar to the sea.

Perils of the sea—Subrogation.—The term "perils of the sea" has a much wider signification in a policy of insurance than in a bill of lading; as the insurer is liable where the loss is proximately caused by a marine disaster, although such disaster may have been indirectly occasioned by the negligence of the carrier. Thus it frequently happens that an insurer who is liable for a loss on a marine policy, from a peril of the sea, after paying the loss, and thus becoming subrogated to the rights of the owner of the property insured, sues and recovers against the carrier, on the ground that the loss was the result of his negligence, and not of a "peril of the sea," within the meaning of the carrier's contract. (*Johnson v. Friar*, 4 Yerg. 48; *Grill v. General Iron Screw Co.* Law R. 1 Com. P. 611, 612; *Williams v. Branson*, 1 Murph. 117; *Bell v. Reed*, 4 Binn. 127; *Hall v. Railroad Co.* 13 Wall. 367; *The Planter*, 2 Wood, 490; *The Ocean Wave*, 5 Biss. 378; *Newcomb v. Cincinnati Ins. Co.* 22 Ohio St. 382.)

The right of action on the part of the insurer in such cases is based on the theory that, by a payment or settlement of the loss, he becomes subrogated, as by an equitable assignment, to any indemnity which the assured could have enforced against the wrong-doer. He sues as representing the assured, and not by virtue of any original right to claim compensation for a wrong committed against another.

In the case of *Rockingham Mutual Ins. Co. v. Boshier*, 39 Me. 253, the insurer, having paid a loss under a fire policy, brought suit in its own name against a party alleged to have willfully and maliciously kindled the fire which destroyed the property, for the purpose of injuring the assured and the plaintiff. The defendant interposed a general demurrer. The Court held that the action could not, at common law, be maintained in the name of the insurer, inasmuch as the only wrong done was a wrong to the owner of the property. That payment to the owner

by the insurer does not bar the right against another party originally liable for the loss, but the owner by recovering payment of the insurers becomes trustee for them, and by necessary implication makes an equitable assignment to them of his right to recover *in his name*. (Citing *Hart v. Western Railroad Corporation*, 13 Met. 99; *Mason v. Sainsbury*, 3 Doug. 61; *Yates v. Whyte*, 4 Bing. N. C. 254; *The London Assurance Co. v. Sainsbury*, 3 Doug. 245.)

In the case of the *Connecticut M. L. I. Co. v. N. Y. & N. H. R. R. Co.* 25 Conn. 265, the same principle was asserted. The plaintiff company paid a loss on a life policy, and then sued the defendant for having, by negligence, caused the death of the assured. The Court held that, at common law, no such action could be maintained. That from a common-law point of view, the injury was done solely to the deceased, and as he could not possibly have maintained an action for it, there was no legal ground on which the insurer could do so.

ARTICLE II.

INSURABLE INTEREST.

- § 94. Insurable interest in a ship.
- § 95. Interest reduced by bottomry.
- § 96. Freightage, what.
- § 97. Expected freightage.
- § 98. Interest in expected freightage, what.
- § 99. Insurable interest in profits.
- § 100. Insurable interest of charterer.

§ 94. *The owner of a ship has, in all cases, an insurable interest in it, even when it has been chartered by one who covenants to pay him its value in case of loss.*

Civ. Code Cal. 2659. N. Y. Civ. Code, 1447.

As the owner of the chartered ship has both the legal and equitable title, there is no reason why the covenant of the charterer to pay him its value in case of loss should destroy or diminish his insurable interest in the vessel.

§ 95. *The insurable interest of the owner of a ship hypothecated by bottomry is only the excess of its value over the amount secured by bottomry.*

Civ. Code Cal. 2660. N. Y. Civ. Code, 1448.

When money is loaned on bottomry, and the vessel is lost before arriving at the place where the loan is payable, the bottomry obligation cannot be enforced. The object of insurance is indemnity, and as the borrower on bottomry only risks the excess of the value of the vessel over the amount of the bottomry obligation, he is only permitted to insure that excess. Without this restriction, while the loss of the vessel would cancel the bottomry debt, the borrower might at the same time recover from the insurer the entire value of his vessel, and so derive a profit from its loss. Thus while he would be discharged from all obligation toward the lender, he would receive, on the part of the insurers, the same sum in the shape of pure gain. (Meredith's Emerigon, ch. 8, § 11.)

The lender may insure his interest in the vessel to the amount of the bottomry obligation, but it appears to be necessary that he should describe that interest specifically in the policy. (Glover v. Black, 3 Burr. 1394; doubted in Mackenzie v. Whitworth, Law R. 10 Ex. 142, 1 Ex. D. 36; Robertson v. United Ins. Co. 3 Johns. Cas. 250; Jennings v. Ins. Co. 4 Binn. 244, 251.)

Rights of bottomry holder and insurer.—The holder of a bottomry bond, in the event of a marine disaster to the hypothecated property which does not utterly destroy it, is entitled to his lien on what remains, although there may have been a constructive total loss, a payment of the same, and an abandonment and assignment to the insurer.

In *Insurance Co. v. Gossler*, 6 Otto, 645, the ship *Frances*, laden with a cargo of sugar, sailed from Java, bound for Boston. After leaving port she encountered a hurricane, and the master was obliged to give a bottomry bond on ship and cargo to defray the expenses of repairing the damages sustained.

The bottomry bond contained a clause providing, in substance, that in case of an "utter loss" of the vessel, the loan and interest should not be payable, and all parties liable therefor should be discharged therefrom, and the loss wholly borne by the lender, save and except only that the said lender should be entitled to such average as could, by this stipulation, be lawfully secured to him on all salvage recoverable in respect to the said vessel, freight, and goods, or any of them.

The vessel, while pursuing her voyage to Boston, encountered a storm which cast her ashore on Cape Cod, in Massachusetts.

The lender's agents succeeded in saving somewhat less than half the sugar on board, and sent it to Boston.

The vessel was surveyed as she lay on the beach, and being found incapable of repair, was broken up, and sold for about \$5,800.

The owners of the cargo abandoned to the underwriters, and claimed a total loss, received payment of the same, and assigned their interests to the insurer.

The defendants, agents of the lender, sold the sugar saved, and insisted (the bottomry being on cargo as well as ship) that they were entitled to apply the same toward payment of the bottomry bond. The insurer contended that under the abandonment and assignment he was entitled to these proceeds, inasmuch as there had been constructively an utter or total loss of the vessel, which, by the terms of the stipulation, avoided the bond.

It was held by the Supreme Court of the United States, that the vessel, though constructively a total loss, was not utterly lost within the meaning of the bottomry bond. That so long as a vessel remains in specie in the hands of her owners, she is not utterly lost for bottomry purposes.

"By an abandonment," says Mr. Justice Clifford, delivering the opinion of the Court, "the insurer is placed in the situation of the insured whom he represents, and can have no greater right than the insured

would have had. Unlike that, the lender on bottomry loses his remedy only when the ship or other property is wholly lost; and where parts are preserved, such parts are esteemed his proper goods, being presumed to be the product of his money; and he therefore takes preference of the owner or insurer. In case of shipwreck, the owners are not personally bound, except to the extent of the fund salvaged which has come into their hands." (*The Virgin*, 8 Pet. 538.)

The insurer claimed that, under the stipulation in the bond, the lender was entitled, at most, only to such a proportion of the property saved as the amount of the loan bears to the whole value of the property hypothecated; but the Court, though admitting that continental writers differed on the question, refused to take that view of the case. Judgment was affirmed in favor of the lender. (See also *Wheeler v. The Smilax*, 2 Pet. Adm. 298, 299; *Pope v. Nickerson*, 3 Story, 487-490.)

The same principle was asserted in *Stephens v. Broomfield*, Law R. 2 P. C. 516, and *Broomfield v. Southern Ins. Co.* Law R. 5 Ex. 192. See also *Thomson v. Royal Exchange Ass. Co.* 1 Maule & S. 30. On a deviation or sale of the vessel, the bottomry bond becomes due. The *Draco*, 2 Sum. 192; Code de Commerce, art. 328; note by Rogron.)

The Code de Commerce, art. 331, provides that if there be a bottomry bond and also a policy of insurance on the same ship or merchandise, the proceeds of the effects saved from shipwreck are to be divided between the lender on bottomry to the extent of his capital only, and the insurer to the amount of the sum insured, in proportion to their respective interests, without prejudice to the privileges established by article 191 of the same Code. (This article regulates the relative priorities of various claims in respect to ships and vessels.)

Thus, suppose a ship worth \$100,000 is bottomried for a loan of \$20,000, and the owner obtains insurance on the

balance of \$80,000. The ship suffers a constructive total loss; the owner abandons; the underwriter pays \$80,000, and the salvage on the ship is divided between the lender on bottomry and the underwriter, in the proportion of \$20,000 to \$80,000, or 1 to 4. See note by Rogron, art. 331, Code de Commerce.

By the law of France, though the lender on bottomry can insure the principal sum loaned, he is prohibited from insuring the maritime interest thereon. (Code de Commerce, art. 347.)

§ 96. *Freightage, in the sense of a policy of marine insurance, signifies all the benefit derived by the owner, either from the chartering of the ship or its employment for the carriage of his own goods or those of others.*

Civ. Code Cal. 2661. N. Y. Civ. Code, 1449.

Chancellor Kent (3 Com. *219) remarks, that "freight, in its more extensive sense, is applied to all rewards or compensation paid for the use of ships, including the transportation of passengers."

The definition given in the section above cited seems not to include the compensation to be received by the owner for the carriage of passengers directly by him; but where the ship is chartered, and used by the charterer as a passenger vessel, the compensation to be paid by the latter to the owner appears to be "freightage," as above defined.

A ship-owner, who also owns cargo on board, can insure his interest in its safe arrival under the general designation of freight. (*De Vaux v. J'Anson*, 5 Bing. N.C. 519; *Wolcott v. Eagle Ins. Co.* 4 Pick. 429; *Flint v. Flemyng*, 1 Barn. & Adol. 45.)

Where the property to be carried would not, owing to its peculiar character, or its position in the vessel, be covered by a policy on "goods or merchandise" generally, a policy on "freight" generally, without explanation, will not insure the compensation to be received for the transportation of such property.

Thus live stock and cargo stowed on deck cannot ordinarily be insured simply as "merchandise," nor can the freight to accrue on their safe transportation be insured simply as "freight." The risk in such cases being greater than that represented by the terms of the policy, the insurer is not liable. (*Dodge v. Bartol*, 5 Me. 286; *Wolcott v. Eagle Ins. Co.* 4 Pick. 435; *Toledo F. & M. Ins. Co. v. Speares*, 16 Ind. 52; *Adams v. Warren Ins. Co.* 22 Pick. 163; *Taunton Copper Co. v. Merchants' Ins. Co.* id. 108; *Smith v. Mississippi M. & F. Ins. Co.* 11 La. 142; *Miller v. Titherington*, 7 Hurl. & N. 954.)

But where, by special designation in the policy, or by a general usage regulating the transportation of cargo, the insurer is apprised of the nature of the risk, the policy will be enforced. (*Northwestern Ins. Co. v. Aetna Ins. Co.* 26 Wis. 78; *Taunton Copper Co. v. Merchants' Ins. Co.* 22 Pick. 108; *Merchants' Ins. Co. v. Shillito*, 15 Ohio St. 559; *Milward v. Hibbert*, 3 Ad. & E. N. S. 120; *Allegre v. Ins. Co.* 2 Gill & J. 136; *Chesapeake Ins. Co. v. Allegre*, id. 164. See *Wood v. Phoenix Ins. Co.* 12 Reporter, 231.)

It will be observed that the term "freightage," § 96, is in terms restricted to the benefit derived "*by the owner*" from the employment of the vessel. The question whether one who is not an owner can insure any interest which he may have in the safe arrival of cargo, under the general designation of freight, has been discussed in several cases, with various results.

In *Riley v. Delafield*, 7 Johns. 522, the plaintiff first chartered the vessel, and then sold her; but it was agreed between himself and the purchaser that he was to receive the compensation to be paid by the charterer. The plaintiff then procured insurance to be made on the *freight* of cargo for the voyage for which the vessel had been chartered. Suit having been brought on the policy, the Court decided that the interest of the plaintiff arose solely from the special agreement between him and the purchaser, and could not properly be "denominated

freight, since it was not an interest accruing to the plaintiff, *as owner of the vessel*, for the use of her. It was an interest founded entirely upon the agreement, and could not have been claimed or recovered under any other title. It could not be insured as freight *eo nomine*, unless accompanied with a disclosure of the peculiar nature of the interest. It would otherwise be an imposition upon the insurer, who, when he is asked to insure freight, must presume that he is dealing *with the owner of the vessel*. The owner has a stronger interest in the equipment and management of the vessel than a stranger having no such stake in the voyage. And to allow such an interest to be covered, under the name of freight, without explanation, would lead to abuse and fraud, by affording an opportunity to cumulative insurances upon the same interest, and interested combinations to destroy it. . . . The contract ought to contain within itself the identity and certainty of the subject-matter, so that the parties may understand the engagement with precision, and calculate accordingly."

The correctness of the decision in *Riley v. Delafield* is strenuously contested by Judge Duer (*Insurance*, vol. 2, p. 453), and also by Mr. Phillips (*Ins.* vol. 1, § 480). Mr. Arnould (*Ins.* vol. 1, p. *259) seems to concur in the criticisms of these learned writers. (See also *Cheriot v. Barker*, 2 Johns. 346; *Robins v. N. Y. Ins. Co.* 1 Hall, 325.)

In *Mellen v. National Ins. Co.* 1 Hall, 462, the charterer of a vessel had insured freight on all cargo laden or to be laden on board the schooner *Enterprise* on the designated voyage, meaning thereby, as he insisted, to insure the difference between the price paid by him to the owner for the use of the vessel, and the compensation to be received by him from shippers of cargo on bills of lading.

It was held that the charterer had no interest which he could insure as freight. "His liability to pay the charter money depends upon the safe arrival of the ship and the performance of the voyage. If she is lost, or fails to per-

form the charter, his obligation to pay the charter money ceases. What interest, then, can he have in her carrying a freight, which, if lost, he is discharged from his liability to pay?"

The plaintiffs offered parol evidence to show that the insurer knew what the subject of the insurance was, but the evidence was rejected.

In respect to the claim of the plaintiff that he had an insurable interest in the surplus of the compensation to be received by him, over the amount to be paid by him, the Court held that the facts of the case failed to disclose the existence of any such surplus.

"What," says Jones, C. J., "would be the rule in the case of a surplus?—whether such excess would be held an insurable interest in the charterer or not; and whether, if insurable, it would be covered by a general policy on freight *eo nomine*, or would require a disclosure and specification of the nature of the interest; and whether such disclosure and specification would be requisite to a binding valuation of the interest—are questions which we deem it unnecessary in this case to agitate, for here was no surplus."

In *Huth v. N. Y. M. I. Co.* 8 Bosw. 538, it was held, that, where the price paid by the charterer for the charter exceeds the amount he would receive under it, he can have no insurable interest in freight. The opinions of the three judges are not entirely in harmony on the question, whether, under any circumstances, the charterer's interest in the compensation to be paid him by shippers of merchandise can be insured as "freight."

In the courts of Massachusetts, it is held that a charterer may insure his interest in the compensation to be paid him by shippers under him by the general designation of freight. (*Oliver v. Greene*, 3 Mass. 133; *Bartlett v. Walter*, 13 id. 267; *Robinson v. Manufacturers' Ins. Co.* 1 Met. 146; *Clark v. Ocean Ins. Co.* 16 Pick. 289.)

In several of the cases above cited, two distinct ques-

tions are raised and discussed: First, under what circumstances a charterer has such an interest in the safe arrival of the cargo of the chartered ship as to sustain a policy of insurance in his favor; second, supposing him, in a given case, to have such interest, can he, without further explanation, insure it under the general description of freight.

Where the charter party is such that freight is not due by the charterer, except in case of the safe arrival of the vessel at her port of destination, if the freight to be paid by him exceeds the money to be received by him under the charter, it is not his interest that the vessel should earn freight by her safe arrival; but, on the contrary, that she should fail to perform the voyage.

Where the charter party is, in effect, a lease of the vessel, and freight is payable absolutely to the owner, the charterer has an interest in the safe arrival of any merchandise that may be transported in the vessel during the continuance of the charter. It is his interest that money should be earned under the charter to prevent loss on the freight paid or absolutely due to the owner. The authorities vary as to the designation under which this interest of the charter should be insured: some holding that it is covered by the term "freight"; others, that it must be insured under some special appropriate designation. (See *Watson v. Duykinck*, 3 Johns. R. 336; *Clark v. Ocean Ins. Co.* 16 Pick. 292.)

As § 96 restricts the signification of "freightage" to "benefit derived by the owner," it would seem that the charterer (except perhaps where he is owner *pro hac vice*) cannot, under that designation, insure his interest in the safe arrival of cargo.

Passage money.—Passage money and freight are generally governed by the same rules; but whether the term "freight" in a marine policy is to be deemed to include passage money must depend on the circumstances of the particular case and the terms of the policy. (*De-noon v. Home and Cal. Ins. Co.* Law R. 7 Com. P. 342.)

In the case of the Ship *Lavinia*, 1 Pet. Adm. 123, 125, it was held that no passage money is due unless the passenger is carried to the port of destination. (See *Brown v. Harris*, 2 Gray, 359.) The liability of the owner to repay the passage money will sustain a policy for its insurance. (*Ogden v. Mutual L. I. Co.* 35 N. Y. 420, affirming 8 Bosw. 248.)

In the case of *Ogden v. Mutual Ins. Co.* 35 N. Y. 418, it was held that a passenger who has paid his passage-money in advance is entitled to recover it back, if, without fault on his part, he is not carried to the place agreed on, and that where, in such case, the carrier insures his passage money, and the ship is lost before arriving at the place agreed on, the insurer is liable on his policy, without proof that the carrier has refunded, or been called on to refund, the passage money. (See also, *Ogden v. N. Y. Mutual Ins. Co.* 4 Bosw. 447; 8 id. 248; 35 N. Y. 418.)

Freight not insurable by French law. — Freight, in the English and American sense of the term, is not insurable under the law of France. (*Meredith's Emerigon*, ch. 8, § 8, p. 183. Code de Commerce, art. 347.)

§ 97. *The owner of a ship has an insurable interest in expected freightage, which he would have certainly earned but for the intervention of a peril insured against.*

Civ. Code Cal. 2662. N. Y. Civ. Code, 1450.

That is to say, he must have an inchoate right to freight in order to entitle him to insure it; and such right must have been prevented from becoming perfect by the operation of some peril insured against. (1 Arnould Ins. *202; 3 Kent's Com. *270; *Thompson v. Taylor*, 6 Term Rep. 478; *Adams v. Warren Ins. Co.* 22 Pick. 163.)

§ 98. *The interest mentioned in the last section exists, in the case of a charter party, when the ship has broken ground on the chartered voyage, and if a price is to be paid for the carriage of goods when they are actually on board, or there*

is some contract for putting them on board, and both ship and goods are ready for the specified voyage.

Civ. Code Cal. 2663. N. Y. Civ. Code, 1451.

1st. Insurance of chartered freight.—When a vessel is chartered, the compensation to be paid by the charterer to the ship-owner for the use of the vessel, or for the opportunity of using it, under the provisions of the charter party, is denominated freight. This description of freight may be due by the charterer to the ship-owner, even though no cargo has been placed on board the vessel. Whenever, under the terms of the charter party, the relations between the owner and charterer are such that freight is in process of being earned, and the earning of it is prevented solely and exclusively by the perils insured against, the assured is entitled to recover from the insurer the amount insured upon such freight.

The authorities amply sustain the proposition contained in the first clause of § 98, that an insurable interest in freight exists as soon as the ship has broken ground on the chartered voyage. (*Thompson v. Taylor*, 6 Term Rep. 478; *Williamson v. Innes*, 8 Bing. 81; *Atty v. Lindo*, 1 Bos. & P. N. R. 236; *Ellis v. Lafone*, 8 Ex. 546; *Horncastle v. Stuart*, 7 East, 400. See also, *Davidson v. Willasey*, 1 Maule & S. 313; *Truscott v. Christie*, 2 Ball & B. 320.)

But the modern authorities go farther, and seem to sustain the proposition laid down by Mr. Phillips, Ins. § 335, that "a vessel being chartered from A to B, the interest in freight commences under the charter party on the vessel sailing for A, either in ballast or with a small quantity only of goods, for B; that is, if the prior passage is merely preliminary to the one for which the vessel is chartered, having no cargo deliverable at A or any intermediate port, and the object in the passage to A is merely to prosecute the voyage thence to B, the interest on the whole freight, under the charter party, accrues on the commencement of the first passage."

In *Barber v. Fleming*, Law R. 5 Q. B. 59, the plaintiff,

on the 7th of August, 1866, chartered his ship C., "now lying at Bombay," for a voyage from Howland's Island (one of the Chincha Islands) to a port in the United Kingdom, for a full cargo of guano; freight to be paid at port of discharge. The ship sailed from Bombay in ballast for Howland's Island, but got ashore on the coast of New Zealand, and was there lost. Before the ship's departure from Bombay, the owner effected insurance "at and from Bombay to Howland's Island, while there, and thence to any port in the United Kingdom, on freight, chartered or otherwise, valued at £3,600, in the ship C."

It was held, that, as the ship had sailed in ballast from Bombay with the sole object of going to Howland's Island, in order to earn freight under the charter party, the interest in the chartered freight had commenced on her departure from Bombay for that island, and that the plaintiff could recover the loss under the policy.

It was contended by counsel for the underwriter, that the *chartered voyage* had not commenced at the time of the loss, and that freight was not to be earned by the voyage from Bombay to Howland's Island, but exclusively by the voyage from that island to the port of discharge. But the Court held otherwise, citing *Phillips Ins. §§ 328, 335*, and *Adams v. Warren Ins. Co.* 22 Pick. 163, and decided, that when the plaintiff had begun the voyage from Bombay to Howland's Island, he had done something toward the fulfillment of the charter sufficient to create an insurable interest in the chartered freight.

It would seem, therefore, that the policy attaches to the risk on chartered freight, not merely when the ship has broken ground on the chartered voyage, but when she is on her way to the port from which the chartered voyage is to begin, simply for the purpose of fulfilling her obligations under the charter party; and the terms of the policy cover the freight of the ship while proceeding to such port. It will be observed that in *Barber v. Fleming*, just cited, the chartered voyage was simply from Howland's

Island to a port of discharge in the United Kingdom; and that the vessel was lost on the voyage from Bombay, before arriving at Howland's Island; but that the assured was protected by insurance "from Bombay to Howland's Island, while there, and to any port in the United Kingdom, on freight."

The doctrine of *Barber v. Fleming* (affirmed in *Merc. S. Co. v. Tysen* Law Rep. 7 Q. B. D. 75; see also *Robinson v. Manufacturers' Ins. Co.* 1 Met. 143, 146, and *Hart v. Delaware Ins. Co.* 2 Wash. C. C. 346) seems to admit of being thus formulated.

The owner of a chartered ship has an insurable interest in its chartered freight as soon as the ship, solely and exclusively for the purpose of the fulfillment of the charter party and as a necessary preliminary to such fulfillment, has broken ground for the port at which the chartered voyage is to commence.

Where the policy designates the period at which the risk is to commence, as in *Gordon v. American Ins. Co.* 4 Denio, 360, it supersedes the general rule. In such case, the owner who has insured his freight may have had an inchoate right thereto; and yet in case of loss, the restrictions contained in his policy may be such as to prevent a recovery against the underwriter. (*Jones v. Neptune M. I. Co.* Law R. 7 Q. B. 702; *Beckett v. West of England M. I. Co.* 25 L. T. N. S. 379; *Joyce v. Realm Ins. Co.* Law R. 7 Q. B. 580; *Jones v. Imperial Ins. Co.* id. 702; *Gordon v. Am. Ins. Co. of New York*, 4 Denio, 362.)

2nd. Insurance of freight by owner, when the freight is simply a compensation "for the carriage of goods."—Where the goods are actually on board, under a contract of affreightment, the ship-owner obviously has a pecuniary interest in their safe transportation and delivery, in order that he may earn freight, except in those cases where freight is paid in advance absolutely, and is not recoverable back in the event of the non-delivery of the goods.

"Where there is some contract for putting them (the goods) on board, and both ship and goods are ready for the specified voyage," the owner has an insurable interest in the freight to be earned. These conditions are to be taken conjunctively, as the existence of either without the other would not create an inchoate right to freight. Thus, freight valued at \$6,500 was insured at or from any port or ports in Hayti to Liverpool, or the ship's port of discharge in the United Kingdom. The ship arrived at Jacmel, in Hayti, with a cargo intended for barter. She there exchanged part of her outward cargo for fifty-five bales of cotton, and with these and most of her outward cargo still on board, was proceeding to Aux Cayes, also in Hayti, to replace this outward cargo by goods to be shipped at that port, when she was lost by a peril of the sea. There was no evidence that any other goods had been contracted for at Aux Cayes, to be laden as part of the homeward cargo. The plaintiff claimed to recover the entire amount of freight insured, but the underwriters contended that they were liable only for the freight on the fifty-five bales of homeward cargo. The Court held that their view of the case was correct, as the ship was not under charter party, and was never in a condition to receive her homeward cargo (except the fifty-five bales) even had it been ready, which it never was, to put on board. (*Forbes v. Aspinall*, 13 East, 323; *Forbes v. Cowie*, 1 Camp. 520.)

But where the cargo is ready for shipment, under a valid contract, on the homeward voyage, and the vessel is ready to begin to receive it, but is prevented from doing so by a peril insured against, the insured freight of the homeward voyage can be recovered. (*Williamson v. Innes*, 1 Moody & R. cited 8 Bing. 81, note; *De Longuemere v. N. Y. F. Ins. Co.* 10 Johns. 202; *Hodgson v. Mississippi Ins. Co.* 2 La. 341.)

In order that the cargo should be ready for shipment, it is not necessary in all cases that it should be in close

proximity to the vessel. Much will depend on the particular locality, on general commercial usage, and the special custom of the place or trade. "All that it seems necessary to determine, with regard to the cargo, is that it must have become the property of the parties insured, by a contract made with a view of its being sent on board, and actually in a state of readiness, reference being had to the nature and description of the voyage insured, to be put on board when the ship arrives at the place of deposit." (*De Vaux v. J'Anson*, 5 Bing. N. C. 539. See also, *Montgomery v. Egginton*, 3 Term Rep. 362; *Thompson v. Taylor*, 6 id. 478; *Truscott v. Christie*, 2 Brod. & B. 320; *Parke v. Hebson*, id. 329; *Warre v. Millar*, 4 Barn. & C. 538; *Flint v. Flemyng*, 1 Barn. & Adol. 45; *Foley v. United F. & M. I. Co.* Law R. 5 Com. P. 155.)

As the owner may insure under the designation of freight or freightage his interest in the safe transportation of his own goods, it remains to be considered under what circumstances such interest is regarded as existing. Section 98 is silent on this point, though the definition of freightage in § 96 includes such interest.

It seems, as the result of the authorities on this point, that the ship-owner's insurable interest in freight or freightage on his own goods commences whenever he has goods ready to ship, or a valid contract for their purchase, and the ship is in readiness to receive them, or is on her way to the port at which they are to be laden for the purpose of receiving them. (*De Vaux v. J'Anson*, *supra*; *Flint v. Flemyng*, *supra*; *Paradise v. Sun Mutual Ins. Co.* 6 La. An. 596; *Hart v. Delaware Ins. Co.* 2 Wash. C. C. 346.)

Freight paid in advance. When payment is made by shipper or charterer, on account of freight, the presumption, according to the English authorities, is that it is paid absolutely, and not subject to the contingency of the safe arrival of the goods at their destination. (*Saunders v. Drew*, 3 Barn. & Adol. 445.) In the recent case of

Byrne v. Schiller, Law R. 6 Ex. 20, 320, the Court, while doubting the correctness of this rule, which has not been adopted either in the United States or on the continent of Europe, felt obliged to adhere to it on the principle of *stare decisis*.

But the American authorities hold, that as freight is the compensation for the carriage of goods, if it be paid partially or wholly in advance, and the goods be not carried by reason of any event not imputable to the shipper, it is to be repaid, in the absence of any agreement to the contrary. (Pitman v. Hooper, 3 Sum. 50, 66; Griggs v. Austin, 3 Pick. 19; Watson v. Duykinck, 3 Johns. 335.) In such case, in the absence of any pledge or assignment of the freight, the shipper has no insurable interest therein. For, if the goods arrive safely, freight will have been paid to the extent of the amount advanced; if they fail to arrive safely, the ship-owner will be indebted to the shipper for the amount advanced. (Phelps v. Williamson, 5 Sand. 578.) The advance is in the nature of a conditional loan, to be refunded only in case of the non-arrival of the goods. But the shipper acquired no interest in the freight or earnings of the vessel by a mere advance of freight money on the credit of the owner; his interest was in the goods, not in the vessel, and therefore he could not insure on "freight prepaid." (Minturn v. Warren Ins. Co. 2 Allen, 86. See Benner v. Equitable Ins. Co. 6 id. 222; Chase v. Alliance Ins. Co. 9 id. 314.)

Duration of risk on ship. The commencement and termination of the risk depend on the terms of the contract, which may be a voyage or time policy, or a mixed policy prescribing the voyage, but protecting the ship only during the period specified. (Gambles v. Ocean Ins. Co. Law R. 1 Ex. D. 8, 141; 45 Law J. C. L. 366.) If the policy is on time, and the date of the commencement of the risk is omitted, it is deemed to commence from the making of the policy. (Ball v. Knight, Fitz. 274; Barn. 454.) In a voyage policy, if the *terminus a quo* is omitted, the risk is deemed to

commence at the port at which the vessel was laden at the time of the execution of the policy, and from which she sailed for the destination therein mentioned. (*Folsom v. Merchants' M. M. Ins. Co.* 38 Me. 414.) A policy at and from a home port in which the vessel is then lying, protects the vessel during her stay in port, provided she does not remain there so long as materially to change the risk assumed by the insurer. (*McLachlan's Arnould's Ins.* 378; 3 *Kent's Com.* *307; *Palmer v. Marshall*, 8 Bing. 79; *Palmer v. Fleming*, 9 id. 460; *Patrick v. Ludlow*, 3 Johns. Cas. 14; *Smith v. Surridge*, 4 Esp. 25.)

If at the time of issuing the policy the vessel is abroad or in a foreign port, or expected to arrive at such port in the course of a voyage, the policy, by the word "at," will attach upon the vessel and cargo from the time of her arrival at such port. If, on the other hand, the vessel has been a long time in such port, without reference to any particular voyage, the policy will attach only from the time that preparations are begun to be made with reference to the voyage insured; and if the party insured acquired the ownership subsequent to such time, and before the date of his policy, then the policy will attach only from the time of his acquiring such ownership. If, on the other hand, the ship is at a home port at the time of effecting such insurance, the policy seems generally to attach only from the date of the policy. (*Loring v. Seaman*, 1 Mason, 139; *Kemble v. Bowne*, 1 Caines, 75. See also *Vallance v. Dewar*, 1 Camp. 503.)

If a ship expected to arrive at a foreign port be insured simply "at and from" that port, it seems that the policy will attach as soon as the vessel is within the port in such a condition of repair or seaworthiness as to be there in safety. If, after entering port in this condition, she sustains damage from a peril insured against, the insurer will be held liable. (*Motteux v. London Ass. Co.* 1 Atk. 548; *Parmeter v. Cousins*, 2 Camp. 235, 237; *Bell v. Bell*, 2 id. 475; *Haughton v. Empire Marine Ins. Co.* Law R. 1 Ex. 206.)

In this latter case, the ship *Urgent* had been insured, "lost or not lost," at and from Havana to Greenock. The ship, which was covered by insurance from Nassau to Havana, arrived at the latter port with a cargo of coal; took a pilot inside the harbor, and employed a steam tug to tow her to an anchorage within the harbor. While proceeding on her course she grounded. She was subsequently got off, but was found to have sustained damage from the anchor of another ship. The assured sued to recover damages resulting from this casualty.

It was insisted, on behalf of the insurer, that the policy did not attach until the vessel was safely moored within the harbor, citing *Samuel v. Royal Exchange Company*, 8 Barn. & C. 119; *Zacharie v. Orleans Ins. Co.* 17 Mart. (La.) N. S. 637; Phill. Ins. § 938, 969.

The Court of Exchequer (Channell, B., delivering the opinion) sustained a verdict which had been entered for the plaintiff, on the ground that the vessel was, within the meaning of the policy, at Havana when the damage occurred. "The damage occurred at Havana, geographically speaking, and there is nothing which, to my mind, shows that the parties, at the time this policy was underwritten, contemplated any other meaning of the word 'at'; all the limitation which the law appears ever to have imposed as to the time of the commencement of the risk in such a case is, that the ship should arrive at the port at which she is insured in a state of sufficient repair or seaworthiness to be enabled to lie there in safety. See *Par-meter v. Cousins*, 2 Camp. 235, and *Bell v. Bell*, 2 id. 475, in the latter of which cases, the ruling of Lord Ellenborough, C. J., at *Nisi Prius*, was upheld by the Court in Bank. Here, however, there seems to be no doubt that the ship was really within the harbor in good safety, and the loss occurred from a peril in the harbor, and in no way from any injuries received before her arrival. The ship being assured while at Havana, is evidently, in the absence of any provision to the contrary, insured all the

time she is there, and therefore the risk commences on her first arrival, as put by Lord Hardwicke in *Motteux v. London Assurance Company*, 1 Atk. 545. . . . It has been argued that the first arrival, which must be no doubt in good safety, must be identical with the mooring in good safety usually named in outward policies. But I think that we cannot construe the terms of one contract by reference to those of another not referred to in it."

The rule here laid down seems to be in conformity with the American decisions. (*Taylor v. Lowell*, 3 Mass. 331; *Merchants' Ins. Co. v. Clapp*, 11 Pick. 56. See also *Stone v. Marine Ins. Co.* Law R. 1 Ex. D. 81; *Foley v. United F. & M. Ins. Co.* Law R. 5 Com. P. 155.)

An insurance on a ship from a port takes effect only after the ship has broken ground on her outward voyage. (*Molloy*, 255; *Bond v. Nutt*, Cowp. 607; *Pettegrew v. Pringle*, 3 Barn. & Adol. 514; *Mey v. South Carolina Ins. Co.* 3 Brev. 329; *Union Ins. Co. v. Tysen*, 3 Hill, 118; *Bowen v. Hope Ins. Co.* 20 Pick. 275; 3 Kent's Com. *307.)

When a ship which is expected to arrive at a foreign port is insured at and from that port, the risk begins as soon as she arrives there in good safety, provided that she arrives within such time that the risk assumed by the insurer is not materially varied; if there is delay beyond such time, the policy does not attach. (*De Wolf v. Archangel Maritime Insurance Co.* Law R. 9 Q. B. 451.)

This action was on a voyage policy issued July 13th, at and from Montreal to Montevideo. No information was asked or given as to the *situs* of the ship, but she was, at the time of effecting the policy at sea, bound for Montreal, at which port, however, owing to sea perils, she did not arrive until August 30th. It was proved that the delay changed the voyage from a summer to a winter one, and increased the risk. The jury found that the delay, though conceded to be beyond the control of the insured, was unreasonable, and that the risk was thereby materially changed. The Court, on these facts, held that the risk did

not attach, citing *Hull v. Cooper*, 14 East, 472; *Driscoll v. Passmore*, 1 Bos. & P. 200; *Brine v. Featherstone*, 4 Taunt. 869; *Mount v. Larkins*, 8 Bing. 108, 122; *Vallance v. Dewar*, 1 Camp. 503; *Ougier v. Jennings*, 1 id. 505, note.

A policy insuring a ship to a designated port, without any provision as to her safety there, continues until she is anchored at the port of destination, in the usual place for the discharge of her cargo. (*Stone v. Marine Ins. Co. L. R. 1 Ex. D. 81*; *Code de Commerce*, art. 328; *Bill v. Mason*, 6 Mass. 313.)

Where a ship is insured on a voyage from port to port, and for a specified period after her arrival, the policy will protect her while in her port of destination until the expiration of that period, even though the voyage may have been terminated by the substantial discharge of the cargo, and preparations may have been made for a new voyage. (*Gambles v. Ocean Ins. Co. L. R. 1 Ex. D. 141.*)

The risk by the terms of the policy usually continues until the vessel has been anchored twenty-four hours in safety. But if, during the continuance of the risk, the vessel has sustained damage from a peril insured against, the extent of which is not ascertained until after the termination of the risk, there does not appear to be any good reason why the assured may not, according to the facts, recover either a partial or a total loss. (*Knight v. Faith*, 15 Q. B. 667; *Peters v. Phoenix Ins. Co. 3 Serg. & R. 25.*)

Where the policy is "at and from" any island or district, these words in general protect the ship in sailing from one port to another in that island or district for the purpose of loading, at least if the whole island or district is usually considered as one place; but it would be otherwise if the policy were at and from her port of lading in such an island or district, as the commencement of the voyage would then be restricted to one particular place; and generally speaking, the words "port of lading" comprehend one place only, and it is a deviation, if a ship insured at and from her port of lading begin to load at one

place and finish at another out of the line of her intended voyage, even though within the jurisdiction of the same custom-house. (Smith's Mer. Law (Am. ed.), 401, citing *Camden v. Cowley*, 1 Black. W. 417; *Bond v. Nutt*, Cowp. 601; *Forshaw v. Chabert*, 3 Brod. & B. 158; *Warre v. Millar*, 4 Barn. & C. 538; *Cruickshank v. Jansen*, 2 Taunt. 301; *Brown v. Tayleur*, 4 Ad. & E. 241.

But where a vessel is insured to an island or district, the risk as to the vessel determines at the first port at which she stops to unload. (*Camden v. Cowley*, *supra*; *Leigh v. Mather*, 1 Esp. 412; Smith's Merc. Law, 405; *Inglis v. Vaux*, 3 Camp. 437.) But if the vessel be insured to her port or ports of discharge in such island or district, she will be protected until her arrival at the last port of discharge. (Meredith's Emerigon, ch. 13, § 18, p. 586; *Inglis v. Vaux*, 3 Camp. 437; *Moore v. Taylor*, 1 Ad. & E. 25.)

The term "good safety" in a policy on ship means safety from the perils insured against, and not from those of a mere local character, and incident to the port, as bad moorings, etc.; otherwise the policy might not attach all the time she lay there. But she must be moored as safely as that harbor or port permits in the usual course of navigation. And if the vessel be ordered off, or into quarantine, before the twenty-four hours have passed, the policy does not cease to attach. (*Waples v. Eames*, 2 Strange, 1243.) And if she anchors and moors safely, and her usual safety continues through a storm or peril which begins before or within the twenty-four hours, but does no harm until they have expired, she is considered as moored in safety during the twenty-four hours; because otherwise, the risk might never terminate, for so long as the ship is in any port, she must be in some degree of danger or possibility of mischief. 2 Parson's Mar. Law, 326, citing *Bill v. Mason*, 6 Mass. 313, in which case Parsons, C. J., remarked: "The vessel is safe within the terms of the policy until she suffers a loss insured against."

A ship that has already received her death wound, though kept afloat for more than twenty-four hours after arriving at her port of destination, cannot be said to have been at any time after the accident "in safety." (*Shaw v. Felton*, 2 East, 109.) So a ship detained in a hostile port by an embargo, her master and crew being treated as prisoners of war, is not in safety. (*Minett v. Anderson*, Peake, 211; *S. P. Horneyer v. Lushington*, 15 East, 46.) But a vessel which has been moored twenty-four hours in safety is deemed to have concluded her voyage, although she is subsequently confiscated for a violation of the revenue laws committed during the voyage. (*Lockyer v. Offley*, 1 Term Rep. 252.)

A vessel arriving in port a mere wreck, kept afloat by being lashed to a hulk, and foundering a few days afterwards in an attempt to remove her to the shore, was never in good safety after her arrival. (*Shawe v. Felton*, 2 East, 100.)

In *Lidgett v. Secretan*, Law R. 5 Com. P. 190, the term "good safety" seems to have been construed more favorably for the insurer than in some preceding cases. The risk on ship was there described in writing in the policy as follows: "At and from London to Calcutta, and for thirty days after arrival," and then followed the printed words, "upon the ship, etc., until she hath moored at anchor twenty-four hours in good safety." The vessel, having sustained such damage from sea perils as to require constant pumping to keep her afloat, arrived at Calcutta, and was safely moored there on the 28th of October, 1866. Her cargo was unloaded in safety by the 8th of November. It was necessary to continue the pumping during the discharge of the cargo until she was much lightened. On the 12th she was removed from her moorings to a dry-dock for survey and repair, and was there destroyed by an accidental fire on the 5th of December. It was held that, as the vessel remained at her moorings more than twenty-four hours as a ship, though damaged, and not as

a mere wreck, she had been moored twenty-four hours in good safety; and as her destruction did not take place until after thirty days from that time, that the risk had terminated at the time of the loss.

The term "good safety" implies also the opportunity of discharging cargo in the manner customary at the port in question. (*Waples v. Eames*, 2 Strange, 1243; *Samuel v. Royal Exchange Assurance Co.* 8 Barn. & C. 119; *Angerstein v. Bell*, Park Ins. 54; *Dickey v. United Ins. Co.* 11 Johns. 358; *Zacharie v. Orleans Ins. Co.* 17 Mart. (La.) 637.)

Where a vessel is insured simply to a designated port, the insurance terminates as soon as she is anchored there in safety, under conditions that admit of her proceeding to discharge her cargo. (*Dickey v. United Ins. Co. supra*; *Gray v. Gardner*, 17 Mass. 188; *Meigs v. Mutual Marine Ins. Co.* 2 Cush. 439. See *Ellery v. New England Ins. Co.* 8 Pick. 14.)

A vessel insured "to her port of discharge in any designated part of the globe" is protected by the policy until she arrives at that port at which her cargo is substantially discharged, though a small remnant may remain on board not sufficient in value to justify the expense of proceeding to another port in order to dispose of it. (*Inglis v. Vaux*, 3 Camp. 437; *Moore v. Taylor*, 1 Ad. & E. 25; *Upton v. Salem Com. Ins. Co.* 8 Met. 608.)

The port at which a vessel in distress is obliged to unload a part of her cargo is not her port of discharge within the meaning of the policy. She will, in such case, be protected by her insurance until she has arrived at the port voluntarily selected for the discharge of her cargo. (*Leigh v. Mather*, 1 Esp. 412; *Sage v. Middletown Ins. Co.* 1 Conn. 239.) Neither is a port in which a vessel may enter tentatively, for purposes of inquiry, or with a view to discharging there, "her port of discharge," if, in fact, she does not break bulk there, but proceeds to another port to discharge her cargo. (1 Phill. Ins. § 962;

Lapham v. Atlas Ins. Co. 24 Pick. 1; **Coolidge v. Gray**, 8 Mass. 527; **Clark v. United F. & M. Ins. Co.** 7 id. 365; **King v. Middletown Ins. Co.** 1 Conn. 184.)

When, by the terms of the policy, the vessel is to proceed to one of two designated ports of discharge, the risk ends at the first of the two ports at which she discharges cargo. (**Stephens v. Beverly Ins. Co.**, cited 2 Parsons Mar. Ins. 54.)

A vessel was insured for one year from November 23rd, 1859, by a policy which contained the following clause: "If on a passage at the end of the term, the risk to continue at *pro rata* premium until arrival in port of destination." The vessel, laden with coal from Liverpool, was under charter to the French Marine, by which she was to proceed direct to Woosung, near Shanghai, and then take orders from the Chief of Marine, who would indicate to the captain within twenty-four hours whether he should discharge at Woosung or go on to Chusan. The vessel arrived at Woosung December 25th, 1860; the captain gave notice the next day to the French authorities, and received an order not to discharge at Woosung, but to remain there waiting further directions. This order was sanctioned by the terms of the charter party. On the 6th of January, 1861, the ship, while lying at Woosung, was destroyed by fire. Suit having been brought on the policy, the insurer insisted, that, under the circumstances of the case, Woosung had become, and was at the time of the loss, the port of destination; and the Supreme Court of Massachusetts so held on appeal. (**Wales v. China Mut. Ins. Co.** 8 Allen, 380.)

Policies on time frequently provide that if, at the expiration of the specified period, the vessel shall be "at sea," or "on a passage," the risk shall be continued during a further period, or until the occurrence of some specified event. Questions frequently arise under policies of this description, which require a judicial determination of the meaning of the expressions "at sea" or "on a pas-

sage." Many cases of this character are referred to and analyzed in *Phill. Ins.* § 953. (See also *Washington Ins. Co. v. White*, 103 Mass. 238; *Cole v. Union Ins. Co.* 12 Gray, 501; *Gookin v. New England Ins. Co.* id. 501; *Bowen v. Hope Ins. Co.*, and *Same v. Merchants' Ins. Co.* 20 Pick. 275.)

Although a vessel may be insured to any port or ports in a designated district, until her arrival at her last port of discharge therein, still, if on her arrival within that district she finds some of those ports in the possession of a hostile force, so that intercourse with them would be unlawful, she is restricted to those ports which are not thus occupied. If under these circumstances she enters one of these ports for the purpose of discharging and selling her cargo if the markets should prove favorable, and, after having been safely moored for twenty-four hours, is injured by a sea peril, such port will be considered as her "last port of discharge" in the district, even although the possibility of proceeding to one of the ports held by the enemy had not been abandoned. (*Brown v. Vigne*, 12 East, 283. Compare *Oliverson v. Brightman*, Law R. 8 Q. B. 781.)

The description of the voyage or voyages contained in the policy is construed with reference to established usage and the course of trade, which are always supposed to be known to the insurer, and to enter into the contract of insurance. (*Kingston v. Knibbs*, 1 Camp. 508 n; *Salvador v. Hopkins*, 3 Burr. 1707; *Noble v. Kennoway*, Doug. 510; *Vallance v. Dewar*, 1 Camp. 503; *Ougier v. Jennings*, 1 Camp. 505; *Gregory v. Christie*, Park Ins. 14; *Farquharson v. Hunter*, id. 84.)

An insurance to an island or district, as "to Jamaica," generally ends as soon as the ship has anchored twenty-four hours at any one port there. (*Camden v. Cowley*, 1 Black. W. 417, 418.)

In *Barras v. London Assurance Co.*, cited in *Shee's Marshall's Ins.* 214, Lord Mansfield held that the outward risk

on the ship ended after her arrival in the first port of the island to which she was destined; but that the outward policy on goods continued until they were landed.

The rigging, tackle, and provisions of a ship temporarily stored on shore, according to custom, while the ship is being repaired or refitted, are covered by the policy to the same extent as if still attached to or on board of the ship.

(*Pelly v. Royal Exch. Ass.* 1 Burr. 341; *Brough v. Whitmore*, 4 Term Rep. 206.)

A policy contained the following clause: "This policy attaches as follows: Schooner Potomac, Norfolk to Salem or Boston." The ship proceeded to Salem, without a previous election of Boston as the port of final destination, but was immediately ordered to proceed to Boston, and was lost on her way to that port. It was held that the risk terminated at Salem. (*Dodge v. Essex Ins. Co.* 12 Gray, 65.)

Insurance is sometimes effected on a ship until her "arrival," or for a specified period after her arrival at a designated port or coast. For cases where this term has been construed, see *Whitwell v. Harrison*, 2 Ex. 127; *Meigs v. Mutual M. I. Co.* 2 Cush. 439.

It frequently becomes necessary to ascertain the precise signification of the term "port" as applied to the locality designated in the policy. A place may be within the legal limits of the port, and yet not be within the port in the geographical and commercial sense of the term. (See *Constable v. Noble*, 2 Taunt. 403; *Payne v. Hutchinson*, 2 id. 405, note; *Moxon v. Atkyns*, 3 Camp. 200; *Fay v. Alliance Ins. Co.* 16 Gray, 455; *Dickey v. United Ins. Co.* 11 Johns. 358; *Zacharie v. Orleans Ins. Co.* 17 Mart. (La.) 637; *Hull Dock Company v. Browne*, 2 Barn. & Adol. 43; *Stockton & Darlington R. R. Co. v. Barrell*, 7 Man. & G. 870; *Roelandts v. Harrison*, 9 Ex. 444; *Sea Ins. Co. v. Gavin*, 2 Dow & C. 124; *Cockey v. Atkinson*, 2 Barn. & Ald. 460; *Van Baggen v. Baines*, 9 Ex. 253.)

Duration of risk on goods.—The risk on goods commonly begins, according to the language of the policy, "from the loading thereof on board the said ship." It may, of course, begin at an earlier period by the agreement of the parties, as is the case in some of the European policies, which insure the goods while they are in transit from the shore or wharf, or even as soon as they are on the wharf or quay for the purpose of being conveyed on board the vessel. The French Code of Commerce, article 328, insures the goods while in lighters *en route* to the ship, and until landed. (See 1 McLachlan's Arnould, p. 356.)

Where goods are insured at and from a designated port "from the loading thereof on board the said ship," the English Courts hold that the policy fails to protect the goods if they have in fact been laden at another port. (*Langhorn v. Hardy*, 4 Taunt. 628; *Horneyer v. Lushington*, 15 East. 46; *Spitta v. Woodman*, 2 Taunt. 416; *Mellish v. Allnutt*, 2 Maule & S. 106; *Rickman v. Carstairs*, 2 Nev. & M. 571; *Constable v. Noble*, 2 Taunt. 403; *Payne v. Hutchinson*, 2 id. 405.) The French Courts seem to observe the same rule. (1 Pouget Droit Mar. 160.)

These decisions have been followed in the American Courts. (*Graves v. Marine Ins. Co.* 2 Caines, 339; *Scriba v. Ins. Co. of North America*, 2 Wash. C. C. 107; *Richards v. Marine Ins. Co.* 3 Johns. 307; *Vredenburg v. Gracie*, 4 id. 444; *Murray v. Columbian Ins. Co.* 11 id. 302.) But both the English and American Courts have manifested an inclination to relax the extreme strictness of this rule, especially where nothing appears to indicate that the averment of the ship's loading at the designated port was regarded by the parties as a warranty. (See *Phill. Ins.* § 939; *Carr v. Montefiore*, 5 Best & Smith, 408, 430; *Bell v. Hobson*, 16 East, 240, 248; *Gladstone v. Clay*, 1 Maule & S. 418; *Monnen v. Kittlewell*, 16 East, 176. See also *Manly v. United F. & M. I. Co.* 9 Mass. 85; *Martin v. Fishing Ins. Co.* 20 Pick. 389; *Behn v. Burness*, 3 Best & Smith, 751.)

Nor is the rule applied where the terms of the policy

show that the insurance is on a trading voyage, during which the vessel is to touch at various ports to discharge and take in cargo, as may be found expedient. The policy is, in such case, so construed as to carry out the intention of the parties by holding it to cover all goods shipped at any of the ports within the scope of the policy. (Meredith's *Emerigon*, ch. 13, §§ 7, 8, pp. 558, 559; *Violett v. Allnutt*, 3 Taunt. 419; *Grant v. Delacour*, 1 id. 466; *Grant v. Paxton*, 1 id. 463; *Barclay v. Stirling*, 5 Maule & S. 6; *Hunter v. Leathley*, 10 Barn. & C. 858; 7 Bing. 517.)

Barter policies frequently contain a stipulation that outward cargo is to be considered homeward interest twenty-four hours after arrival at first port of trade; and the outward and homeward cargo being thus both insured, the whole adventure is protected until the termination of the risk. (See *Tobin v. Harford*, 13 Com. B. N. S. 791; 34 Law J. Com. P. 239; 3 Kent Com. *310, *311.)

A policy on an outward cargo and its proceeds home will not cover the same cargo when brought back. It will, however, protect a homeward cargo procured by money or credit of the consignees at the port of discharge, though the outward goods remain unsold for want of a market. (3 Kent Com. *311, citing *Grant v. Paxton*, 1 Taunt. 474; *Columbian Ins. Co. v. Catlett*, 12 Wheat. 383; *Coggshall v. American Ins. Co.* 3 Wend. 283.)

The policy usually covers the goods "until safely landed." Under this stipulation, they will be protected until landed in safety at the usual place of discharge, according to the custom at the port of discharge. (*Stewart v. Bell*, 5 Barn. & Adol. 238; *Matthie v. Potts*, 3 Bos. & P. 23; *Rucker v. L. A. Co.* id. 432; *Tierney v. Etherington*, 1 Burr. 348; *Osacar v. Louisiana Ins. Co.* 5 Mart. (La.) N. S. 386; *Mansur v. New England Ins. Co.* 12 Gray, 528; 3 Kent Com. *309.)

An open policy was effected on goods insured in gross against fire and other marine risks, "to continue on the property until landed." While the goods were

being landed at the port of destination a fire occurred, which destroyed the goods that had been landed. The vessel, with the remaining goods on board, was with difficulty removed from the wharf and saved. Held, that the insurer was not liable for the loss of the goods which had been landed. (*Mansur v. New England Ins. Co.* 12 Gray, 520, citing *Gardiner v. Smith*, 1 Johns. Cas. 141; 3 Kent Com. *309; *Phill. Ins.* § 972; *Mobile Marine Dock & M. I. Co. v. McMullan*, 27 Ala. 78; *Gracie v. Maryland Ins. Co.* 8 Cranch, 84; *Osacar v. Louisiana State Ins. Co.* 17 Mart. (La.) 386; *Fletcher v. St. Louis Marine Ins. Co.* 18 Mo. 193; *Chickering v. Fowler*, 4 Pick. 371; 2 *Arnould Ins.* § 289; *Hyde v. Trent & Mersey Navigation Co.* 5 Term Rep. 397; *Norway Plains Co. v. Boston & Maine R. R.* 1 Gray, 271. See *Fletcher v. St. Louis M. I. Co.* 18 Mo. 193.)

Merchandise was insured on a trading and bartering voyage "at and from Boston to ports in Sumatra and Java, for the purpose of disposing of the outward and procuring a return cargo, and thence to the port of discharge in the United States, with liberty to touch at the usual places, and trade thereat." The policy contained the usual clause against restraints and detention of princes. A chest of opium was discharged from the ship, and landed at a port in the island of Sumatra, in order that it might, in pursuance of a contract between the captain and the chief magistrate of the place, be exchanged for certain other merchandise and a sum of money. A dispute having arisen as to the terms of the exchange, the chest of opium, which had been put on board the ship's boat to be carried back to the ship, was seized and carried off by the chief magistrate's men. Under the terms of the policy, it was held that, notwithstanding the temporary landing of the chest of opium, the insurers were liable for its loss. (*Parsons v. Mass. F. & M. Ins. Co.* 6 Mass. 197. See *Tierney v. Etherington*, cited 1 Burr. 348, 349.)

If the consignee takes charge of the goods himself before they are safely landed, as by receiving them in his own lighters, the insurer is discharged. (*Strong v. Nattally*, 4 Bos. & P. 16; *Low v. Davy*, 5 Binn. 595; *Bold v. Rotherham*, 8 Q. B. 797; *Sparrow v. Carruthers*, 2 Strange, 1236.)

Where an insurance is effected on goods not to any particular port but to an island or coast containing several ports at which the vessel is authorized to touch for purposes of trade, the policy will, it seems, protect the property until the adventure is substantially terminated by the landing of the cargo at the port or ports contemplated by the parties. (*Barras v. London Ass. Co. Marshall*, 266; *Leigh v. Mather*, 1 Esp. 412; *Stocker v. Harris*, 3 Mass. 406; *Moore v. Taylor*, 1 Ad. & E. 25; *Gardiner v. Smith*, 1 Johns. Cas. 141, and criticism of Mr. Phillips thereon; *Phill. Ins.* § 972.)

Goods necessarily transhipped, owing to a peril insured against, continue under the protection of the policy until safely landed at the port of destination. (*Plantamour v. Staples*, 1 Term Rep. 611; *Bold v. Rotherham*, 8 Q. B. 797; *De Cuadra v. Swann*, 16 Com. B. N. S. 772. See *Bryant v. Commonwealth Ins. Co.* 13 Pick. 543, 555; *Columbian Ins. Co. v. Pierce*, 14 Allen, 320.) The French law is to the same effect. (1 *Pouget Droit Mar.* 369; *Code de Commerce*, art. 390, 391, 394.)

§ 99. *One who has an interest in the thing from which profits are expected to proceed has an insurable interest in the profits.*

Civ. Code Cal. 2664. *N. Y. Civ. Code*, 1452.

Profits should be described *eo nomine* in the policy, in order that the underwriters may understand with what subject they are dealing. (*Niblo v. North Am. F. I. Co.* 1 Sand. 557.)

In order to recover on a policy on profits, it is not necessary to show that any profits would have been earned

but for the intervention of the peril insured against. (*Patapsco Ins. Co. v. Coulter*, 3 Peters, 222.)

In *Mumford v. Hallett*, 1 Johns. 433, the written part of the policy described the insurance as "on profits"; then followed the printed words, "on all goods, etc., for so much as concerns the assured and assurers in this policy are and shall be valued at \$2,500," for which amount the policy was issued.

A total loss by capture ensued.

The Court held that the policy was on profits, and added: "Though the profits are not valued, yet every such insurance must of necessity be considered as a valued, not an open, policy; especially if the goods themselves, as is the case here, are valued. If it were otherwise, it would be next to impossible to prove their value, as is done in regard to vessels and cargoes." (*See Laurent v. Chatham F. I. Co.* 1 Hall, 47.)

Commissions.—A commission merchant to whom the cargo of a vessel is consigned for sale has an insurable interest in his expected commissions, and may insure the same while the vessel is on her voyage. (*Putnam v. Mercantile Ins. Co.* 5 Met. 392.) The Court likened the case to an insurance "on profits, depending on the arrival of the vessel at a particular port, and founded on like expectations. It partakes not of the nature of wager; for in the event of the wager, independent of the policy, the party insured has nothing to lose. Here, if there were no insurance, the party would lose his commissions if there should be a loss of the cargo."

In *Holbrook v. Brown*, 2 Mass. 280, the master of the ship, whose commissions on cargo were seven and a half per cent., took out a policy "on property" in the vessel. He owned no property on board, but was interested in the safe arrival of the cargo, in order that he might earn his commission. The underwriters refused to pay, on the ground that "property" must be understood to mean merchandise, and that the master had really no right even to

commissions until the cargo had arrived safely. The Court decided that he had an insurable interest which was sufficiently described as property in the vessel, and awarded judgment in his favor.

Insurance on expected profits void by French law.—English law.—Insurance on expected profits on merchandise is prohibited by § 347 of the Code de Commerce.

The English authorities hold that profits can be insured either in open or valued policies, but that in case of loss the assured must prove that, had not the perils assumed by the underwriter prevented the safe arrival of the goods, some profit would have been realized by their sale. (*Hodgson v. Glover*, 6 East, 316.) When profits are insured in an open policy, such proof seems indispensable in order to determine the amount of the recovery. Chancellor Kent seems to consider the English rule correct as to the necessity of proof of some anticipated profits, but concedes that the American rule, as above stated, dispenses with the necessity of such proof, 3 Kent. 272.

§ 100. *The charterer of a ship has an insurable interest in it, to the extent that he is liable to be damnified by its loss.*

Civ. Code Cal. 2665. N. Y. Civ. Code, 1453.

The charterer of a vessel is liable to be damnified by its loss to the extent of the excess of the freight which he is to receive from shippers under the charter party over the freight to be paid by him to the ship-owner. In case he has made to the ship-owner any advances absolutely on account of freight, which are not to be repaid him in case of loss of the vessel, these also constitute an item of insurable interest. (*Ellis v. Lafone*, 8 Ex. 546; 18 Eng. L. & Eq. 559; *Mansfield v. Maitland*, 4 Barn. & Ald. 582, 585.)

ARTICLE III.

CONCEALMENT.

- § 101. Information must be communicated.
- § 102. Material information.
- § 103. Presumption of knowledge of loss.
- § 104. Concealments which only affect the risk in question.

§ 101. *In marine insurance, each party is bound to communicate, in addition to what is required by § 26, all the information which he possesses material to the risk, except such as is mentioned in § 27, and to state the exact and whole truth in relation to all matters that he represents, or upon inquiry assumes to disclose.*

Civ. Code Cal. 2669. N. Y. Civ. Code, 1454.

"In marine insurance, the misrepresentation or concealment by the assured of a fact material to the risk will avoid the policy, although no fraud was intended. It is no answer for the assured to say that the error or suppression was the result of accident, mistake, or inadvertence. It is enough that the insurer has been misled, and has thus been induced to enter into a contract which, upon correct and full information, he would either have declined or would have made upon different terms. Although no fraud was intended by the assured, it is nevertheless a fraud upon the underwriter, and avoids the policy. The assured is bound, although no inquiry be made, to disclose every fact within his knowledge which is material to the risk. But this doctrine cannot be applicable, at least not in its full extent, to policies against fire. If a man is content to insure my house without taking the trouble to inquire of what materials it is constructed, how it is situated in reference to other buildings, or to what uses it is applied, he has no ground for complaint that the hazard proves to be greater than he had anticipated, unless I am chargeable with some misrepresentation concerning the nature or extent of the

risk. It is therefore the practice of companies which insure against fire to make inquiries of the assured in some form concerning all such matters as are deemed material to the risk, or may affect the amount of premium to be paid. This is sometimes done by the conditions of insurance annexed to the policy, and sometimes by requiring the applicant to state particular facts in a written application for insurance. When thus called upon to speak, he is bound to make a full and true representation concerning all the matters brought to his notice, and any concealment will have the like effect as in the case of a marine risk. It is not necessary, for the purpose of avoiding the policy, to show that any fraud was intended. It is enough that information material to the risk was required and withheld." (*Burritt v. Saratoga Co. M. F. I. Co.* 5 Hill, 191. See Angell on Ins. § 174; *Merchants' & Manuf. Bank Ins. Co. v. Washington M. I. Co.* 1 Hand. Ohio R. 408; *Girard F. & M. Ins. Co. v. Stephenson*, 37 Pa. St. 293.)

The opinion of Lord Mansfield, in *Carter v. Boehm*, 3 Burr. 1905, contains a comprehensive summary of the duty of a party applying for a marine policy, in respect to the information to be given to the underwriter touching the proposed risk. "The special facts," he remarks, "upon which the contingent chance is to be computed lie most commonly in the knowledge of the insured only. The underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist.

The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived, and the policy void; because the risk run is really different from the

risk understood and intended to be run at the time of the agreement.

The policy would equally be void against the underwriter, if he concealed; as, if he insured a ship on her voyage, which he privately knew to be arrived, and an action would lie to recover the premium.

The governing principle is applicable to all contracts and dealings.

Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact, and his believing the contrary.

But either party may be innocently silent as to grounds open to both to exercise their judgment upon. *Aliud est celare ; aliud tacere ; neque enim id est celare quicquid reticeas ; sed cum quod tu scias, id ignorare emolumenti tui causâ velis eos, quorum intersit id scire.*

This definition of concealment, restrained to the efficient motives and precise subject of any contract, will generally hold to make it void, in favor of the party misled by his ignorance of the thing concealed.

There are many matters as to which the insured may be innocently silent; he need not mention what the underwriter knows. *Scientia utrinque par pares contrahentes facit.* An underwriter cannot insist that the policy is void because the insured did not tell him what he actually knew, what way soever he came to the knowledge.

The insured needs not mention what the underwriter ought to know, what he takes upon himself the knowledge of, or what he waives being informed of.

The underwriter needs not be told what lessens the risk agreed and understood to be run by the express terms of the policy. He needs not be told general topics of speculations; as, for instance, the underwriter is bound to know every cause which may occasion natural perils; as, the difficulty of the voyage, the kind of seasons, the probability of lightning, hurricanes, earthquakes, etc. He is bound to know every cause which may occasion political

perils: from the ruptures of States; from war, and the various operations of it. He is bound to know the probability of safety from the continuance or return of peace: from the imbecility of the enemy, through the weakness of their councils or their want of strength, etc.

If an underwriter insures private ships of war, by sea and on shore, from ports to ports and places to places, anywhere, he needs not be told the secret enterprises they are destined upon, because he knows some expedition must be in view; and from the nature of his contract, without being told, he waives information. If he insures for three years, he needs not be told any circumstance to show it may be over in two; or if he insures a voyage, with liberty of deviation, he needs not be told what tends to show there will be no deviation.

Men argue differently, from natural phenomena and political appearances; they have different capacities, different degrees of knowledge, and different intelligence. But the means of information and judging are open to both; each professes to act from his own skill and sagacity, and therefore neither needs to communicate to the other.

The reason of the rule which obliges parties to disclose is to prevent fraud and encourage good faith. It is adapted to such facts as vary the nature of the contract which one privately knows, and the other is ignorant of and has no reason to suspect.

The question, therefore, must always be, "whether there was, under all the circumstances, at the time the policy was underwritten, a fair representation, or a concealment, fraudulent if designed; or though not designed, varying materially the object of the policy, and changing the risk understood to be run."

Concealment is the omission by *either party* to the contract to disclose to the other any material information which, if communicated, would tend to induce the party receiving it either to decline entering into the contract or

to demand for himself more favorable terms. It is immaterial whether the concealment arise from fraud, ignorance of the obligation of disclosure, mistake, or inadvertence.

(*Carter v. Boehm*, 3 Burr. 1903; *Biays v. Union Ins. Co.* 1 Wash. C. C. 506; *Oliver v. Greene*, 3 Mass. 133; *Stocker v. Merrimack Ins. Co.* 6 id. 220; *Ely v. Hallett*, 2 Caines, 57; *Walden v. Louisiana Ins. Co.* 12 La. (O. S.) 134.)

"The exact and whole truth" must be communicated in reference to the subject-matter of the disclosure. This is in accordance with the existing rule of law. (2 Duer, Ins. 398, 399.)

The assured will be held to be cognizant of all material facts which he might have known but for his own gross negligence or willful omission to learn them. (*Biays v. Union Ins. Co.* 1 Wash. C. C. 506. See on this point *Wake v. Atty*, 4 Taunt. 493.)

An omission on the part of an agent for effecting insurance to disclose any material information in his possession, or which the principal could have disclosed had he personally effected the policy, will be a fatal concealment. (*Fitzherbert v. Mather*, 1 Term Rep. 12; *Ruggles v. Gen. Int. Ins. Co.* 4 Mason, 74; 12 Wheat, 409. See comments of Judge Duer on this case: Ins. vol. 2, p. 792; *Bowker v. Smith*, Fac. Dec. 1808-1810, p. 571; *Byrnes v. Alexander*, 1 Brev. 213; *Proudfoot v. Montefiore*, Law R. 2 Q. B. 511.)

In the case of *Ruggles v. General Int. Ins. Co.* 4 Mason, 74, the vessel and cargo were insured, lost or not lost, February 9th, beginning the risk on the 12th of January previous; on the 19th of January the vessel was totally lost. The master purposely refrained from giving notice of the disaster to the owner, in order to allow him to effect insurance, as he did, without knowledge of the loss. The suppression of this information by the master was held to be a fraud for which the owner was responsible, and which vitiated the insurance.

On appeal to the Supreme Court of the United States,

judgment was reversed, on the ground that the master had no connection with the business of procuring the insurance, and that after a total loss and abandonment, as in this case, the master ceased to be the agent of the owner, and became the agent of the underwriters. (See, to the same effect, *Clement v. Phoenix Ins. Co.* 6 Blatchf. 481.)

But in the recent case of *Proudfoot v. Montefiore*, Law R. 2 Q. B. 511, the plaintiff's agent at Smyrna advised him by letters of January 12th and 19th of the shipment of certain merchandise for him at that port. The plaintiff, who resided at Manchester, received these letters there, and insured his merchandise. The ship left Smyrna January 23rd, the agent heard on the 24th of the loss of ship and cargo, but refrained from communicating this intelligence by telegraph in order that his principal might, as he actually did, effect insurance in ignorance of the loss. On the 26th, the next ordinary mail after news of the casualty, he informed his principal of it. It was held that the concealment of the agent vitiated the policy.

Chief Justice Cockburn, in delivering the opinion of the Court, laid down the law as follows: "If an agent whose duty it is, in the ordinary course of his business, to communicate information to his principal as to the state of a ship or cargo, omits to discharge such duty, and the owner, in the absence of information as to any fact material to be communicated to the underwriter, effects an insurance, such insurance will be void on the ground of concealment or misrepresentation. The insurer is entitled to assume, on the basis of the contract between him and the assured, that the latter will communicate to him every material fact of which the assured has, or in the ordinary course of business ought to have, knowledge; and that the latter will take the necessary measures, by the employment of competent and honest agents, to obtain, through the ordinary channels of intelligence in use in the mercantile world, all due information as to the subject-matter of the insurance. This condition is not complied with when,

by the fraud or negligence of the agent, the party proposing the insurance is kept in ignorance of a material fact which ought to have been made known to the underwriter, and through such ignorance fails to disclose it." (See *Russell v. Thornton*, 4 Hurl. & N. 788; 6 id. 140. *Contra*, *Snow v. Mercantile M. I. Co.* 61 N. Y. 160, *infra*.)

If an agent in ignorance of a loss known to his principal effect insurance for his principal, the policy will not be void by reason of concealment, if the principal, by using due diligence, could not have apprised his agent of the loss in season to countermand the policy. Due diligence requires only the prompt use of the ordinary medium of communication in similar circumstances. (*Green v. Merchants' Ins. Co.* 10 Pick. 402; *McLanahan v. Universal Ins. Co.* 1 Pet. 186.)

In *Snow and others v. Mercantile M. I. Co.* 61 N. Y. 160, the assured, residing in Liverpool, on the 25th of October, 1866, directed his brother there to write to plaintiffs at New York, to effect insurance on his ship. The brother, on the 27th, wrote accordingly. His letter was received by due course of mail November 8th, 1866. On the 9th of November defendants issued their policy on the vessel for \$5,000. As early as October 30th, 1866, the assured learned that his ship was lost on the English coast.

On the 31st of October the broker acting for the assured wrote (by mail steamer) to plaintiffs, announcing the loss. In his letter he says: "I do not suppose it is my duty to telegram the loss of said ship, do you? If so, I shall better learn how to act in the future. Please inform me on this point."

Suit was brought on the policy. On the trial it was admitted that the Atlantic telegraph was in operation October 31st; that it was not used to communicate the loss, and that defendant issued the policy in ignorance of the loss. Also, "that the telegraph between New York and Liverpool was, in October and November, 1866, used

by merchants and others as a mode of communication, whenever, in their judgment, the interest of their business required the necessary expense for that purpose."

The Court, after a review of the authorities (two judges out of five dissenting), held that plaintiff was not bound to resort to the telegraph to communicate the loss of the vessel, unless that was at the time a usual means of commercial communication, which the evidence did not, in the opinion of the Court, show it to be.

The two judges who dissented held that "it was not reasonable to employ the mail carried by steamship, when the owner and his agent at Liverpool knew that the message could not be received, at least in season to prevent an application for insurance in New York against the perils of a voyage to the East of a vessel then lying a total wreck, near the harbor of Liverpool, on the coast of England." The dissenting opinion further held, that the evidence showed that the Atlantic telegraph was at the time in general use. (See also *Clement v. Phoenix Ins. Co.* 6 Blatchf. 481; *Folsom v. Merc. Ins. Co.* 8 id. 175.)

The assured is not bound, before entering into a contract for insurance, to use all possible accessible means of acquiring information material to the risk, up to the last moment of time, as the omission to call at the post-office on the day of the insurance, if he acts with entire good faith. (See *Wake v. Atty.* 4 Taunt. 493.) But he must not be willfully and intentionally ignorant of facts material to the risk at the time of effecting insurance. (*Neptune Ins. Co. v. Robinson*, 11 Gill & J. 256; *Green v. Merchants' Ins. Co.* 10 Rich. 402; *Byrnes v. Alexander*, 1 Brev. 213; *Graham v. General M. I. Co.* 6 La. An. 432; *Scougall v. Young*, Fac. Dec. 1796-1801, 166; *Bowker v. Smith*, Fac. Dec. 1801-1810, 571; *Murrison v. Gibbon*, Fac. Dec. 1810-1812, 148; *Nicholson v. Power*, 20 L. T. N. S. 580.)

In determining the question of concealment, reference is had to the date of effecting the contract. All material

information with which the underwriter could, up to that time, have been furnished by the assured, supposing the latter to have used due diligence in communicating it, should be supplied. (*Freeland v. Glover*, 7 East, 462; *Grieve v. Young*, Millar on Ins. 65; 2 Duer on Ins. 525.)

Preliminary memorandum known in England as the "slip."—Where there is a complete agreement for insurance contained in what is known, in insurance transactions in England, as a slip, but which would not be available for want of a stamp, and afterwards a policy is executed in conformity with it, if everything material is communicated up to the time of giving the slip, but something material arising between that time and the time of executing the policy is not communicated, there is no concealment so as to vitiate the policy. (*Lishman v. N. M. Ins. Co.* Law R. 10 Com. P. 180; *Cory v. Patten*, Law R. 7 Q. B. 305; *Ionides v. Pacific Ins. Co.* Law R. 6 Q. B. 685; 7 id. 517.)

The "slip" referred to is the proposal submitted by the assured or his broker for insurance. When the terms stated in the slip are agreed on, the underwriter affixes his initials thereto, in token of his assent. The slip, not being stamped, creates no legal obligation on the underwriter, but is considered binding in honor and good faith.

Delivery of policy after knowledge of concealment.—In *Morrison v. Univ. Ins. Co.* Law R. § Ex. 197, the plaintiff's broker effected insurance with defendants on freight October 10th, concealing, but without fraud, a material fact. October 13th the defendants learned the fact which had been concealed; but on the 15th they delivered the policy, without protest or objection. On the 19th defendants learned of the loss of the vessel, and the next day gave notice to plaintiff that they did not consider the policy binding.

On the trial the jury were directed that defendants were bound within a reasonable time after hearing of the concealment to elect whether they would go on with the

policy; and the jury were directed to find whether or not they had so elected. The jury found that they had not.

Held, on appeal, that the direction was right, and that there being no election in point of fact, and no evidence that plaintiff had been prejudiced by the defendants' not electing earlier to disaffirm the policy, the defendants were not estopped from denying its validity; nor was it material to consider whether the conduct of defendants in delivering the policy without a protest had been such as to entitle plaintiff to consider it an election.

Presumed knowledge of contents of Lloyd's List.—On the argument of the case just cited in the Court of Exchequer, Law R. 8 Ex. 52, 54, Bramwell, B., remarked: "That to hold that the underwriter is bound to carry in his head all that is on Lloyd's List relating to a ship in which he has an interest, rather than to hold the owner of the ship bound to disclose it, would be to put a difficult and needless burden on the underwriter; while the opposite view puts no difficulty at all in the way of the owner." (See *Leigh v. Adams*, 25 L. T. N. S. 566.)

It seems that an English underwriter is presumed to know the contents of Lloyd's English Lists, but not of the foreign lists published in foreign languages, and described as being kept in the "inner room" at Lloyd's. (1 Arnould Ins. *562.)

Concealment of information tending to create a presumption unfavorable to the safety of the subject-matter of the insurance.—When the assured had special information that a few hours after the sailing of the vessel a violent storm occurred at her port of departure, it was held that a communication to the underwriters, in general terms, that there had been blowing weather and severe storms on the coast after the vessel sailed, was insufficient. (*Ely v. Hallett*, 2 Caines, 57—one of the judges dissented.) *Moses v. Delaware Ins. Co.* 1 Wash. C. C. 387, is to the same effect. It was known to the underwriters that, after the vessel sailed, there had been

heavy gales on the coast, in the latitude of South Carolina (the vessel was bound to Charleston); but the insured had received information that a most dreadful storm had occurred at Charleston, which had done great damage to the shipping. This he did not disclose, as the Court held he ought to have done, and he therefore failed to recover on his policy.

This case is criticised by Mr. Phillips (Ins. vol. 1, § 577), on the ground that the representation was sufficient to put the insurers on inquiry.

In *Fiske v. New England Ins. Co.* 15 Pick. 310, the vessel sailed from Boston on November 18th or 19th, 1831, bound on a voyage to Smyrna and back. Insurance was effected March 13th, 1832, when the ship, under ordinary circumstances, would have accomplished about two-thirds of her voyage. She was not, therefore, at that time overdue, or a "missing ship." The vessel was never heard of after her departure from Boston.

Payment of the policy was contested, on the ground that the underwriters were not informed that the vessel had sailed when the policy was effected; that this fact was material, and should have been disclosed. The jury found for the plaintiff. The vessel sailed three or four days before a gale or storm, which had occurred on the 22nd of November, and (as the Court held) presumably was not affected thereby. The jury therefore were justified in finding that the date of sailing was not a material fact which required to be disclosed. (See also *Westbury v. Aberdeen*, 2 Mees. & W. 267.)

Though information material in its character should ultimately prove untrue, it must be fully communicated. Thus, insurance was effected November 26th, 1808, on goods on board *ship or ships* (uninsured) from the Canary Islands to London. The agent effecting the insurance knew that one of the ships was named the *President*; but that fact he did not disclose. Information had been received at Lloyd's that a vessel had arrived at Dover from

Teneriffe, which reported the "President, Owens, from Lanzarette, off the Salvages, deep and leaky, on the 27th of October, 1808." This information was untrue. The President was captured as prize of war during the voyage. It was held, however, that the name of the vessel should have been communicated, so as to enable the underwriter to apply the information received at Lloyd's to the subject-matter of the risk. Judgment was given for the underwriter. (*Lynch v. Dunsford*, 14 East, 494. See also *Lynch v. Hamilton*, 3 Taunt. 37; *Da Costa v. Scanderet*, 2 P. Wms. 170; *Seaman v. Fornereau*, 2 Strange, 1183.)

Concealment of information tending to show the vessel to be overdue or a missing ship.—Although a party seeking insurance is not ordinarily bound, in the absence of inquiry, to communicate to the underwriter the date of the vessel's sailing, yet if he is possessed of any information tending to show that she has been so long on the voyage as to justify apprehensions that she has met with some casualty, it must be disclosed. (2 Duer Ins. 468; 1 Arnould Ins. *540.)

Thus, in the case of *Westbury v. Aberdeen*, 2 Mees. & W. 267, the omission of the assured to inform the underwriter that the vessel in question had been seen off Oporto on the 21st of October, bound for London, by a vessel also bound thither, which had parted from her off Oporto in a storm, and which had arrived at London on the 27th of October, five days before the policy was issued, vitiated the policy.

In *Kirby v. Smith*, 1 Barn. & Ald. 672, insurance was effected on the ship *Ocean*, from *Elsineur* to *Hull*. The owner of the *Ocean* (the plaintiff) left *Elsineur* in another vessel July 20th, about six hours after the departure of the *Ocean*, and arrived at *Hull*, after a rough passage, August 9th, when, finding that the *Ocean* had not arrived, he immediately caused insurance to be effected on her. The facts above stated were not disclosed to the underwriter. The jury found for the plaintiff, but

the Court granted a new trial on the ground that the facts concealed were material.

In *Littledale v. Dixon*, 4 Bos. & P. 151, the date of sailing of the insured ship, the *Cumberland*, from Barbadoes, bound to London, was duly disclosed, together with the fact that another vessel that had sailed two days before on the same voyage had arrived three days before the insurance was applied for. It further appeared that, on the same day, a third ship had arrived, which had sailed three days after the *Cumberland*; which latter fact, though known to the assured, was not disclosed. It was shown, however, that the *Cumberland* was a slow sailer, and the two ships that had arrived were very fast sailers. Suit being brought on the policy, the jury found for the plaintiff, and the Court refused to interfere with their verdict.

In *Elton v. Larkin*, 5 Car. & P. 86, the plaintiff, on the 29th of December, effected insurance on the ship *Fanny*, at and from Cadiz to London. He had received information by letter, which he did not communicate to the underwriter, that she was to sail on the 22nd of November. Whether the period from 22nd of November to the 29th of December was so long as to justify the presumption that the ship was a missing ship, was a question in respect to which the testimony was conflicting. The jury held the non-disclosure immaterial, and the Court refused to set aside their verdict.

Stribley v. Imperial Marine Ins. Co. L. R. 1 Q. B. D. 507. On the 24th of January plaintiff received a letter from the master of his vessel, dated at Mazagan, January 9th, stating that he had arrived there December 27th, and had begun loading, but had had very bad weather on the coast, and did not know when they would finish; but would write again. This was the last letter received from him. During the bad weather spoken of the vessel lost her starboard anchor and chain, but the fact was not mentioned by the master, or disclosed to the underwriter,

who, on the 24th of February, insured the vessel, "lost not lost." After leaving Mazagan, the vessel was lost by perils insured against. The Court in Bank, on motion to enter a verdict for defendant, intimated, in accordance with the ruling in *Gladstone v. King*, 1 Maule & S. 35, that an innocent omission by the master to disclose a prior casualty, and the consequent non-disclosure thereof to the underwriter, would not avoid the policy; but held that it should have been left to the jury to determine whether the contents of the letter of January 9th, and the fact that it was the last letter received from the master, were not of a nature to influence an underwriter in estimating the risk.

In *Elkin v. Jansen*, 13 Mees. & W. 655, facts tending to show that a vessel from Seville bound for London had been out forty-one days, were held material.

In *Rickards v. Murdock*, 10 Barn. & C. 527, the plaintiff at Sydney instructed his agent at London not to effect insurance on the ship *Cumberland*, from Sydney, until thirty days after the arrival of the *Australia*, the vessel bringing the instructions, so as to give the *Cumberland* every chance to arrive before insuring. The agent waited thirty-six days, and until two vessels had arrived which had left Sydney after the *Australia*. These facts were not disclosed to the underwriter, and the jury found the concealment to be material. The verdict was sustained by the Court. (See Mr. Duer's comments on this case, 2 Ins. 522.)

In *Mackintosh v. Marshall*, 11 Mees. & W. 116, the plaintiff had received a letter from his principal at St. Johns, Newfoundland, dated 24th December, 1841, in which it was stated that the ship *Elizabeth*, bound for Liverpool, would sail about the 25th inst.

This letter was received by plaintiff, at Liverpool, on the 15th of January following. A second letter dated December 26th (but which did not leave St. Johns until the 30th), nearly in the same terms, was received by plaintiff at Liverpool on the 24th of January.

On the same day the plaintiff was informed by a merchant whom he met on Change, that, according to advices dated December 27th, received by him from Greenock, his informant was not aware that the Elizabeth had sailed up to that date. The policy on the Elizabeth was signed at Liverpool January 28th. Neither the second letter nor the information from Greenock was disclosed before effecting the insurance. The underwriter insisted that information materially effecting the date of the ship's departure and the extent of the risk had been concealed from him, and the Court so held.

Concealment of the date of sailing was held to vitiate the policy in the following cases: *Livingston v. Delafield*, 3 Caines, 49; *Fiske v. N. E. Ins. Co.* 15 Pick. 310; *Himely v. South Carolina Ins. Co.* 1 Mill. Const. 153; *Stewart v. Morrison*, Fac. Dec. 1778-1781, 102; *Key v. Young*, Fac. Dec. 1781-1787, 196; *Allen v. Young*, Fac. Dec. 1801-1807, 248; *Gillespie v. Douglass*, id. 251.

The non-disclosure of the time of sailing will not vitiate the policy if its disclosure would have had no tendency to show that the vessel was overdue or missing. (*Foley v. Moline*, 5 Taunt. 430; *Littledale v. Dixon*, 4 Bos. & P. 151; *Elton v. Larkins*, 5 Car. & P. 86.)

When the ship is known to the assured to be a very excellent sailer, or when she belongs to a class of fast-sailing ships, she may not be out of time in reference to the average duration of similar voyages; yet, from the information received, she may have been at sea for a period so far exceeding the usual duration of her own voyage, or the voyage of the class of vessels to which she belongs, as to justify much apprehension for her safety; and whenever the fear or suspicion of a disaster exists, the facts on which it is grounded, from their probable influence on the decision of the underwriter, are material to the risks, and ought to be disclosed. Nor is it to be doubted, that in these and in all similar cases, not only the time of sailing, but the additional facts relative to the

character and qualities of the ship that render it material, ought to be communicated, unless the assured has the right to presume that they are equally known to the underwriter. (2 Duer Ins. 470, citing *Ratcliffe v. Shoolbred*, 1 Park Ins. 8th ed. 433; *Shirley v. Wilkinson*, 3 Doug. 41; *Willes v. Glover*, 4 Bos. & P. 14; *Bridges v. Hunter*, 1 Maule & S. 19; *Andrews v. Bell*, 1 Esp. 407; *Livingston v. Delafield*, 3 Caines, 49; *Ruggles v. Gen. Int. Ins. Co.* 4 Mason, 74.)

Information tending to create an apprehension of loss by capture (*Da Costa v. Scandaret*, 2 P. Wms. 179), or of the probability that such loss may occur (*Durrell v. Bederley*, Holt N. P. 283; *Beckthwaite v. Nalgrove*, id. 388; *Kinlock v. Campbell*, 18 Fac. Col. 421), should be disclosed.

Concealment of loss.—A, knowing that his vessel had been lost January 8th, 1870, effected a policy on her on the 15th, "lost or not lost," from the 1st of January, 1870, to the 1st of April following.

The insurer, discovering the fraud, refused to pay. A claimed in his complaint that the policy was merely a written fulfillment of a parol contract entered into prior to the loss.

The Court held that, having accepted a written policy showing a contract of insurance made on the 15th of January (at which time A knew of the loss), neither party could abandon it as of no value in ascertaining what the contract was, and resort for that purpose to the verbal negotiations which were preliminary to its execution. (*Insurance Co. v. Lyman*, 15 Wall. 664.)

Concealment of national character and belligerent risk.—Whenever, owing to the existence of a state of war, the property insured is liable to capture, seizure, or detention by a belligerent, the facts creating such liability must be disclosed to the underwriter, unless the case comes within one of the exceptions stated in § 27.

"In the United States," says Judge Duer (2 Ins. 570),

"the law may be considered as now settled, that where the insurance is made 'for whom it may concern,' or by other words as extensive in their meaning, the fact that a belligerent subject is the owner, in whole or in part, of the property insured, is not necessary to be communicated, unless in reply to the inquiries of the insurer. The general words are construed to embrace the belligerent risk." (*Elting v. Scott*, 2 Johns. 157; *Hodgson v. Marine Ins. Co.* 5 Cranch, 100; *Buck v. Chesapeake Ins. Co.* 1 Peters, 151; *Maryland and Phoenix Ins. Co. v. Bathurst*, 5 Gill & J. 159; *Seamans v. Loring*, 1 Mason, 128.)

The spirit of this rule does not seem to be adhered to by the English Courts.

In the case of *Campbell v. Innes*, 4 Barn. & Adol. 423, vessel and cargo were insured "from London to certain ports in America against all risks, American capture included." The property was seized and condemned on arrival, by the American Government, for a breach of the non-importation act. The vessel and cargo were American; but this fact had not been disclosed to the underwriter. It was insisted, however, by the assured, that, as he was protected by the express terms of the policy from the risk of American capture, he was entitled to recover. But the Court held otherwise, on the ground that it had not been disclosed to the underwriter that the vessel and cargo were American property. It was suggested by the Court that the American owner might lend himself to the designs of his own Government, and assist them in confiscating the vessel. Hence the importance of disclosing to the underwriter the American ownership of the property.

Where either the legal title to or an equitable interest in the property insured is vested in a belligerent, the fact should be disclosed to the underwriter, unless the terms of the policy are such as to exclude a risk of that character, or to dispense with any disclosure on the subject. (*Livingston v. Maryland Ins. Co.* 6 Cranch, 274; *Arnold v. The United Ins. Co.* 1 Johns. Cas. 363; *Murray v. United Ins. Co.* 2 id. 168.)

Where a belligerent has adopted a practice not generally known of subjecting property to seizure and condemnation for causes not recognized by the law of nations, it is the duty of the assured who is aware of such practice to disclose to the underwriter any facts that may expose the property to risk from this cause. (*Sperry v. Delaware Ins. Co.* 2 Wash. C. C. 243; *Marshall v. Union Ins. Co.* id. 357.)

Insurance as connected with belligerent rights.

—The owner of a neutral vessel, knowing that she takes belligerent goods disguised as neutral, is bound to disclose the fact in effecting a policy (*Stocker v. Merrimack M. & F. Ins. Co.* 6 Mass. 220), unless from the course of trade and the circumstances of the case, or the terms of the policy, the underwriter is sufficiently chargeable with notice of the fact to impose on him the duty of inquiry. (*Maryland Ins. Co. v. Bathurst*, 5 Gill & J. 159; *Buck v. Chesapeake Ins. Co.* 1 Peters, 151.)

The fact that goods proposed to be insured are contraband of war should be disclosed to the underwriter, unless the terms of the policy are sufficiently comprehensive to include risks arising from that cause, or the goods in question are specifically designated, so that their character is known to the underwriter. (2 Duer Ins. 612.)

Goods shipped for a neutral port with intent on arrival there to transship them to contiguous belligerent territory are contraband of war, within the meaning of the warranty. (*Seymour v. London & Universal M. I. Co.* 27 L. T. 417.)

The case of *Bates v. Hewitt*, Law R. 2 Q. B. 595, shows the necessity of fully apprising the underwriter of a fact material to the risk, which he may have the means of knowing, but which is apparently not present to his mind at the time of making the contract. Insurance was effected at Liverpool in August, 1864, on a steamer named the *Georgia*. Immediately after leaving Liverpool she was captured by a United States frigate.

The underwriter refused to pay, on the ground that the steamer in question was the Confederate steamer Georgia—a fact which had been concealed from him, as he alleged, at the time of effecting the insurance.

It was matter of public notoriety that a steamer known as the Georgia had been engaged in the Confederate service in 1863-64, and that she was afterwards dismantled, and laid up in Liverpool. She was sold there at public auction, and purchased by the plaintiff, who converted her into a merchant vessel.

The proposal for insurance which was handed to the underwriter described the vessel as the "Georgia steamship, chartered on a voyage from Liverpool to Lisbon, and the Portuguese settlements on the west coast of Africa, and back."

The jury found that the defendant was not aware that the Georgia which was offered for insurance was the Confederate steamer, but that he had abundant means of identifying her from his previous knowledge and the information furnished by the plaintiff.

The Court held that, as the identity of the steamer with the Confederate cruiser Georgia was not present to the underwriter's mind at the time of effecting the insurance, and should have been disclosed by the plaintiff, the defendant was entitled to judgment.

It seems, also, that if any part of the cargo consists of contraband goods, that fact should be disclosed to the underwriter on the ship or on other portions of the cargo, as the presence of contraband goods on board may cause a forfeiture of freight, the seizure of ship and cargo, and even the condemnation of the former. (2 Duer Ins. 614, 619.)

Concealment of other matters.—The policy must not contain any statement calculated to mislead the underwriter in respect to the port of lading. Thus where goods were insured "at and from Genoa to Dublin, the adventure to begin from the loading to equip for voyage,"

and the goods were in fact loaded at Leghorn, and not at Genoa, which was an intermediate port, into which the vessel was obliged to put and wait five months for convoy, and this fact, though known to the assured when the contract was made, was not communicated to the underwriter, the concealment was held material. (*Hodgson v. Richardson*, 1 Black. W. 463.)

Where the master is not at liberty to pursue, as is customary, the voyage described in the policy, by such a course as to him shall seem best, but is restricted by positive instructions as to the route he shall take at one particular part of the voyage, the concealment of this limitation on his discretion has been held to avoid the policy. (*Middlewood v. Blakes*, 7 Term Rep. 162. Compare *Houston v. N. E. Ins. Co.* 5 Pick. 89.)

Where the property to be insured is subjected to some peculiar risk known to the assured, but not disclosed by the terms of the policy, it must be communicated to the underwriter. (*Reid v. Harvey*, 4 Dow's P. C. 97; 1 Arnould Ins. *557.)

The case of *Harrower v. Hutchinson*, Law R. 4 Q. B. 523, Law R. 5 Q. B. 584, involved an interesting question touching the concealment of facts respecting the port of loading of the vessel carrying the insured cargo.

The policy was effected in Liverpool in 1861, on bones and bone-ash, "at and from Buenos Ayres and port or ports of loading, in the province of Buenos Ayres, to port or ports of call and discharge in the United Kingdom." The plaintiffs knew at that time that the vessel was going from Buenos Ayres to Laguna de los Padres, a port in the province of Buenos Ayres, to complete her cargo; but this fact was not communicated to the underwriter, who did not know that this place was a port in the province. It was a place between which and Buenos Ayres a local trade was carried on. Vessels could not clear from it to Europe, but had to return for that purpose to Buenos Ayres. Laguna de los Padres was un-

known in 1861 to underwriters as a port of loading; and if underwriters, on such a policy as the above, had been informed that the vessel was going to load there, they would have required a higher premium than that actually charged. The place was little more than a slaughter-house, with a jetty running out into the sea, and shipping lying there was exposed to some peculiar local dangers. The vessel went from Buenos Ayres to Laguna de los Padres, but being unable to get cargo there, she left for Buenos Ayres, and was lost on her way thither.

Suit being brought on the policy, the underwriter pleaded, 1st, that Laguna de los Padres was not a "port of loading"; 2nd, that the non-disclosure of the fact that the vessel was going to that place to complete her cargo was a concealment; 3rd, that the return from Laguna de los Padres to Buenos Ayres was a deviation. The Court of Queen's Bench decided against the defendants on all these points; but on appeal to the Exchequer Chamber, judgment was reversed, all the judges of that Court being of opinion that the defense of concealment was sustained by the facts. Five were of opinion (three dissenting) that Laguna de los Padres was a "port of loading," and one held that the return of the vessel from that place to Buenos Ayres was a deviation.

It appeared in evidence that the plaintiffs having, before they effected the policy in question, applied to another underwriter to whom they disclosed the name of Laguna de los Padres as a port to which the vessel would proceed from Buenos Ayres, were informed by him that the rate would be four guineas on cargo; the rate actually charged in this case was less than half that sum.

The Court held that the underwriter was not presumed to know that Laguna de los Padres was a loading port in the province of Buenos Ayres, that fact not being known generally to the commercial world, or to underwriters; that the fact was material, and that its non-disclosure vitiated the policy.

In *Gandy v. Adelaide Ins. Co.* Law R. 6 Q. B. 747, insurance was effected on a vessel which at the time of the application was classed on Lloyd's register A 1 for seven years; but the day after issuing the policy, was expunged from the list. The evidence showed that vessels classed as above must, by the rules at Lloyd's, undergo a second or half-time survey in the fourth year. If the owner declines to submit to this re-survey, the name of the vessel is expunged from the list. If re-surveyed and approved, she retains her rank, and is marked in the list H. T. (half time).

The owner, prior to applying for insurance, had declined to submit his vessel to a re-survey; but when he made the application, Lloyd's list was referred to by the underwriters, where she still stood A 1, and the plaintiff was asked if the ship there referred to was the vessel in question. He replied that it was. On the 15th November insurance for £300 was agreed on, and the policy issued December 1st.

But on the 16th of November the vessel had been expunged from Lloyd's list, for want of a re-survey.

The jury found that the plaintiff's resolution not to submit to a re-survey was not a material fact; that the underwriter must be presumed to be conversant with the established usage at Lloyd's, and that under the circumstances he ought to have inquired if the vessel had been or would be re-surveyed.

The Court held that the case was properly submitted to the jury, and declined to interfere with the verdict. Cockburn, C. J., dissenting.

In *Foley v. Tabor*, 2 Fost. & F. 663, the insurer, previous to effecting the policy, had chartered the ship; the charter permitting her to carry not over her registered tonnage (1022 tons) of iron.

The underwriter, prior to issuing the policy (which was "on any kind of goods and on the ship"), knew that the ship was to carry iron, but not the weight or quantity. He did not ask for any information from the insured on these points.

A claim for damages resulting from a peril insured against having been preferred against the underwriter, a defense on the ground of concealment was interposed.

The Court (Erle, J.), in charging the jury, stated as follows: "The general rule of law as applied to this case is, Did the assured neglect to communicate to the insurer any fact known to the assured and unknown to the insurer? As to the latter point, actual knowledge is not essential if the insurer knew he had the means of knowing the fact, and it was within his knowledge. If, for example, he knew that he could learn the exact cargo at Lloyd's, and chose not to ascertain it, knowing or believing it would include iron, it was within his knowledge. The material fact must have been known to one party and not within the knowledge of the other. In this case the material fact alleged to have been concealed was the charter under which the ship was to carry iron to a weight not exceeding her registered tonnage; i. e., above 1,000 tons. First, was it material? As it is admitted that the premium would have been 80s. instead of 50s. if that fact had been known, it must have been material within the rule of law I have laid down. Next, did the assured know of it? If the co-plaintiff Ackman knew of it, they did know it. Then, did the defendant know it, or might he have known of it if he chose? The jury found for plaintiff. It was proved on the trial that there was a book kept at Lloyd's, accessible to underwriters, in which the cargoes of insured ships were entered; that the policy in question was effected November 14th, 1859; that the vessel sailed November 13th, and on the 15th the first return of the nature of her cargo was made to Lloyd's. On the 16th of November several of the underwriters (not including the defendant, however) declared off and returned their premiums.

It may be remarked on this case, that the presumption that the insurer knew what cargo the vessel was to carry, because he could have obtained that information by inquiry at Lloyd's, was only a *prima facie* presumption. If

the assured knew, or had good reason to know, notwithstanding this presumption, that the insurer was ignorant that the cargo to be loaded was more than usually hazardous, was it not his duty to apprise the underwriter of that fact? Had the true state of the case been disclosed, a premium of 80s. instead of 50s. would have been demanded. The insured must have known, by the insurer's willingness to accept the latter premium, that he could not have understood the real nature of the risk. The presumption, therefore, that the insurer at the time of entering into the contract knew what cargo the ship was to carry, because he had the means of knowing it, seems to be overcome by the presumption that, had he known it, he would not have undertaken to issue the policy at less than 80s. (See *Mackintosh v. Marshall*, 11 Mees. & W. 116; *Bates v. Hewitt*, Law R. 2 Q. B. 595.) Judge Duer's remarks (2 Ins. 554) on presumption of knowledge by the underwriter, are forcible and just:

"In ordinary cases, where there is no evidence to justify the imputation of fraud, it is not to be doubted that the knowledge of the underwriter, where the proof is not direct and positive, may be inferred from the circumstances that existed when the insurance was applied for. Thus it may not unreasonably be inferred from the circumstances that the intelligence not disclosed had been recently published in the newspapers of the city in which the underwriter resided, and in a journal which it was his constant habit to peruse. But the inference of his knowledge in this and in similar cases may be overthrown by proof that the facts not communicated were in reality unknown to him; and where the presumption is thus repelled, the concealment must operate, as in other cases, to avoid the policy. Frequently the very terms of the insurance may furnish a demonstrative proof that the underwriter did not in fact possess the knowledge that from other circumstances might reasonably be imputed to him. Thus, where the insurance is made at the ordinary rate

of premium, and it appears that the intelligence not disclosed would have shown certainly or probably that a prior loss had occurred, it is morally certain that the underwriter, with a knowledge of the facts, would never have subscribed the policy; and hence the concealment may be justly held to vitiate the contract. It is therefore at his own peril that the assured relies upon circumstantial evidence to prove that material facts, not disclosed by himself, were equally known to the underwriter. However strong may be his own belief of the equal knowledge of the underwriter, the prudent and the honest course is to disclose all the facts known to himself, unless he is certain that he will be able to justify his belief by incontrovertible proof of the fact."

In speaking of the shipping lists known as Lloyd's lists, the contents of which are presumed to be known to English underwriters, Judge Duer remarks (p. 555): "The presumption, however, that the intelligence at Lloyd's is known to the underwriter is not to be considered as absolute. . . . Even when there is no false representation on the part of the assured, if it is certain that the facts published at Lloyd's are unknown to the insurer, and his ignorance is rendered manifest by his acts or declarations, it is the plain duty of the assured to give him the necessary information. The assured cannot be justified in acting on a presumption which he knows to be groundless; nor can I doubt that his silence, in such a case, would be deemed a fraudulent concealment." See also 2 Duer Ins. 562-564.

The assured is under no obligation to state his own apprehensions in respect to the risk proposed; but he must disclose all the material information in his power to enable the underwriter to form a just appreciation of such risk. (*Bell v. Bell*, 2 Camp. 475; 2 Duer Ins. 583.)

Facts that might otherwise have been immaterial become material when the underwriter requires them to be disclosed. By inquiring respecting them, he shows that

he considers them material, and the assured is bound so to regard them. (1 Arnould Ins. *518; 2 Duer Ins. 688, 689; 1 Phillips, § 542; Patten v. Merchants' Ins. Co. 38 N. H. 338, 345; Miller v. Mutual B. L. I. Co. 31 Iowa, 216, 232. See also *ante*, p. 60.)

"The insurer has the right, upon inquiry, to be informed of all facts within the knowledge of the assured, that in the exercise of his own judgment he may deem material to the risks, or important to be known as a guide to his own discretion. Every fact that he believes ought to be considered in forming his decision is material to the insurer. . . . The proposition that the insurer has a right to demand such information as he may deem material necessarily implies a corresponding duty on the part of the assured. Hence, when the information sought is withheld, or the facts are untruly represented, it is a necessary consequence that the insurer is discharged. It is also a necessary consequence, that, in these cases, no other evidence of the materiality of the facts suppressed or falsely represented can be requisite than that the disclosure was required by the insurer; otherwise the situation of the parties would be precisely the same as if no inquiry had been made." (2 Duer Ins. 580.)

By § 33, however, neither party to a contract of insurance is bound to communicate, even upon inquiry, information of his own judgment upon the matters in question.

Concealment of overvaluation.—Concealment of the fact that the insured property is greatly overvalued by the insured may prove fatal to the policy. Thus, in *Ionides v. Pender*, Law R. 9 Q. B. 531, cargo worth about £8,000 was insured, including profits and commissions, for about £16,500. The ship left port May 1st, and was lost with her cargo May 18th, under circumstances which tended to show that she had been purposely, and fraudulently destroyed. Ship and freight had been insured at a fair valuation.

The underwriters on cargo, profits, and commissions refused to pay the loss, on the ground of concealment of the fact of overvaluation, whereby, without their knowledge, the moral risk of the transaction was greatly increased. The argument of the assured was that the physical risk of loss was not in the slightest degree affected by the amount at which the goods were overvalued, and therefore that the concealment was not in respect to any matter material to the risk. The Court, in rendering judgment, said: "We agree that it would be too much to put on the assured the duty of disclosing everything which might influence the mind of an underwriter. Business could hardly be carried on if this were required. But the rule laid down in *Parsons on Insurance*, vol. 1, p. 495, that all should be disclosed which would affect the judgment of a rational underwriter governing himself by the principles and calculations on which underwriters do in practice act, seems to us a sound one. We do not think any of the cases cited by Duer (vol. 2, 388, 518) are in contravention of it; and applying it to the present case, there was distinct and uncontradicted evidence that underwriters do in practice act on the principle that it is material to take into consideration whether overvaluation is so great as to make the risk speculative. It appears to us a rational practice. We think, therefore, that the judge could not do otherwise than leave this question to the jury, and that their verdict (which was for the underwriter) was not against the weight of evidence, and should not be disturbed." (See *Sturm v. Atlantic M. Ins. Co.* 63 N. Y. 77.)

Deck cargo.—In *Clarkson v. Young*, 22 L. T. N. S. 41, the defendant pleaded in an action on a policy of insurance on cargo that the ship carried a deck cargo, and that this fact was not disclosed to the underwriter. This defense was held good so far as it applied to that part of the insured cargo which was carried on deck.

As to deck cargo generally, see *infra*.

§ 102. *In marine insurance, information of the belief or expectation of a third person in reference to a material fact is material.*

Civ. Code Cal. 2670. N. Y. Civ. Code, 1455.

This proposition, in the general terms stated in the foregoing section, introduces a new rule into the law of marine insurance. If the material fact is communicated to the underwriters, or is such as they ought to know and are presumed to know, it has been held unnecessary to communicate to them the belief or expectation either of the assured himself or of a third party in reference to such facts. (*Bell v. Bell*, 2 Camp. 475; *Ruggles v. Gen. Int. Ins. Co.* 4 Mason, 83; *Folsom v. Merc. Ins. Co.* 8 Blatchf. 174.) Where the relations of the third party with the assured or the subject-matter of the policy give peculiar importance and significance to his belief or expectation in reference to a material fact, the expression of such belief or expectation may be a fact which the assured is bound to communicate. (*Willes v. Glover*, 1 Bos. & P. N. R. 14.)

§ 103. *A person insured by a contract of marine insurance is presumed to have had knowledge, at the time of insuring, of a prior loss, if the information might possibly have reached him in the usual mode of transmission and at the usual rate of communication.*

Civ. Code Cal. 2671. N. Y. Civ. Code, 1456. See Code de Commerce, art. 365, 366, and note to § 1.

This presumption may, however, be controverted by other evidence. (Code Civ. Proc. § 1961.) Unless so controverted, the jury are bound to find according to the presumption.

Many of the European commercial ordinances, after determining within what time news of a maritime disaster should be presumed to have been received by the insurer, declare the presumption absolute, *juris et de jure*.

"This matter," says Emerigon Ins. ch. 16, § 3, "is so susceptible of fraud, and the fraud often so difficult of proof, that commercial nations have come, as it were, to

an agreement to establish a presumption, *juris et de jure*, of fraud against the assured or against the insurer, every time that, through the proximity of the places, it is possible that at the time of signing the policy they might have been informed of the loss or safety of the vessel." (See *Snow v. Merc. M. Ins. Co.* 61 N. Y. 160.)

As the use of improved modes for the rapid transmission of intelligence becomes more common in commercial transactions, the presumption of early knowledge of a marine disaster by the insured will become stronger. Whether the electric telegraph is to be regarded as the "usual mode of transmission," seems at present to depend on the particular circumstances of the case in which the question arises. (See case last cited.)

In the case of the *N. E. Carver Company v. Manufacturers' Ins. Co.* 6 Gray, 215, the policy insured, "lost or not lost, \$25,000 on cotton gins and bandings on board of any steamer or steamers at and from New York to New Orleans. All sums placed at risk under this policy are to be indorsed hereon, and this policy is to be closed in twelve months if not sooner filled."

The policy was dated June 14th, 1853.

Action was brought to recover the value of sixteen cotton gins insured by this policy. These gins were shipped on board the steamer *Cherokee* at New York, on August 25th and 26th, 1853. The bill of lading bore date the 26th, and was received by the agent of the insured, at Boston, on the morning of the 27th. The steamer was burned on the evening of the 26th, and the gins destroyed. About 1 P. M. on the 27th, the agent of the insured went to the office of the underwriters, and requested them to indorse the shipment of the sixteen gins on the policy. This request was refused because the property had been lost.

It was held by the Court to be the just and reasonable view of the contract, "that the plaintiffs having paid their premium for insurance to a fixed amount, within a fixed term of time, on any gins to be shipped by any steamer

between the ports named, had the right (under the limitations hereafter stated) to elect upon which of the shipments made they would apply the insurance stipulated for; and that it was the duty as well as the right of the defendants to indorse such risks upon the policy; and if this be so, that the defendants cannot escape from their responsibility by a refusal to indorse a shipment which the plaintiffs reasonably request them to indorse.

The ground of refusal to indorse was, that the property had been already lost. But the policy was to cause the plaintiffs to be insured on gins, "lost or not lost." And while on the one hand it is certainly plain that the plaintiffs cannot, as to any shipments made by them, and coming within the conditions of the policy, wait until they hear that the steamer is either lost, or in peril, it seems to be equally clear that if the party, intending in good faith to have the shipment covered by the policy, notifies the insurer of his election seasonably, the insurer cannot refuse because he has in the mean time—that is, between the shipment and notification—heard of a disaster to the steamer or loss of the goods. There must be, of course, entire good faith in the proceeding, for in this, as in many other cases, the insurer confides in the good faith of the assured. . . . We are of opinion, upon the evidence, that the plaintiff, within a reasonable time and in good faith, notified the defendants of the shipment, and requested the indorsement to be made; that it was the duty of the defendants, even though they had received notice of the burning of the steamer, to make it; and that they cannot avail themselves of such omission of duty to throw the loss upon the plaintiffs." (See a somewhat similar case, *Stephens v. Australasian Ins. Co.* Law R. 8 Com. P. 18; also *Wells v. Pacific Ins. Co.* 44 Cal. 397, 411; *Ionides v. Pacific F. & M. I. Co.* Law R. 6 Q. B. 674; *Arnold v. Pacific M. Ins. Co.* 78 N. Y. 7; *Imperial Marine Ins. Co. v. Fire Ins. Corp.* 4 L. R. C. P. D. 166.)

§ 104. *A concealment in a marine insurance, in respect to any of the following matters, does not vitiate the entire contract, but merely exonerates the insurer from a loss resulting from the risk concealed:*

1. *The national character of the insured;*
2. *The liability of the thing insured to capture and detention;*
3. *The liability to seizure from breach of foreign laws of trade;*
4. *The want of necessary documents; and*
5. *The use of false and simulated papers.*

Civ. Code Cal. 2672. N. Y. Civ. Code, 1457.

This section is a copy of § 1457 of the proposed Civil Code of New York, into which it seems to have been introduced in accordance with the opinion of Judge Duer, who remarks (Ins. vol. 2, p. 640), in commenting on the matters set forth in the above section, that "between the several classes of cases that have now been considered, there exists this common resemblance that in each the loss resulting from the risks concealed is a loss from seizure, and that its occurrence by a necessary consequence reveals the facts that discharge the insurer; and hence the propriety of applying to all the same rule of construction and decision. It cannot be denied that it is the language of some of the American decisions relative to the transportation of enemies' property, and the violation of belligerent decrees, that the concealment of the risk *avoids the policy*; but it will be found on examination that in all these cases the loss in fact proceeded from a condemnation of the property; that is, from the risks concealed. So that the question whether, had it been occasioned by any other peril named in the policy, the insurer would have been liable, was not in fact raised, and was unnecessary to be considered. The general language of the Court, therefore, must be construed in each case with reference to its actual circumstances; and thus interpreted, means no more than that the policy was so

far void as to exempt the insurer from the payment of the loss. Where the loss arises from the carriage of contraband articles, from an illicit trade, or from the want of necessary or the use of simulated papers, the rule is undoubted that the concealment operates as an exception to the risk, and without affecting the general liability of the insurer, merely discharges him from the consequent loss; and between these cases and the transportation of enemies' property, or the violation of an unjust ordinance or arbitrary decree of a belligerent power, no valid distinction can be stated to warrant the application of a different rule. In all, the extraordinary risk concealed is that of a seizure and confiscation of the property; and as in all the peril is the same, the particular cause from which it may arise in each is immaterial; and to admit a distinction purely arbitrary would be to violate, without excuse, the symmetry of the law."

The risk of seizure by reason of any of the causes set forth in § 104 is excepted from the policy, in case of a concealment of the facts creating such risk.

But may not the risk thus excepted be "otherwise material"? (Subd. 4, § 27.) May not the concealment of the belligerent ownership of a vessel induce an underwriter to insure her against the usual risks, when, had he known the fact, he would have declined to do so?

"It is evident," says Judge Duer (Ins. vol. 2, p. 578), "that the liability of the ship to capture may force or induce the master to deviate widely from the ordinary course of the voyage, in order to avoid the risk; and that by such a deviation the sea risks of the voyage may not only be essentially altered, but materially increased. The imminent dread of capture is, in ordinary cases, a just cause of deviation; but whether it would be so considered under a policy from which the risk of capture is excluded, unless the existence of the risk was known or disclosed to the underwriter, may be reasonably questioned."

As by § 118, a deviation is proper "to avoid a peril,

whether insured against or not," the apparent result of these two sections is, that an underwriter who would not have insured against sea risks property liable to capture; had such liability been disclosed to him, is obliged to pay a loss resulting from a peril occasioned by a deviation made for the purpose of avoiding such capture.

The law in respect to the proposition contained in § 118, subd. 2 (which see), is not satisfactorily settled. (See *O'Reilly v. R. E. Asso. Co.* 4 Camp. 246; *Breed v. Eaton*, 10 Mass. 21; *Murden v. South Car. Ins. Co.* 1 Mill. Const. 96; *Riggin v. Patapsco Ins. Co.* 7 Har. & J. 279.)

The preponderance of authority seems, however, to be in favor of the rule that where the risks to which the vessel is exposed are known to the insurer, and of these certain designated risks only are covered by the policy, a necessary deviation to avoid any risk which the vessel may encounter is no violation of the policy. (*Robinson v. Marine Ins. Co.* 2 Johns. 89; *Riggin v. Patapsco Ins. Co.* *supra*; 1 Phill. Ins. § 1023.)

ARTICLE IV.

REPRESENTATIONS.

§ 105. Effect of intentional falsity.

§ 106. Representation of expectation..

§ 105. *If a representation by a person insured by a contract of marine insurance is intentionally false in any respect, whether material or immaterial, the insurer may rescind the entire contract.*

Civ. Code Cal. 2676. N. Y. Civ. Code, 1458.

§ 106. *The eventual falsity of a representation as to expectation does not, in the absence of fraud, avoid a contract of insurance.*

Civ. Code Cal. 2677. N. Y. Civ. Code, 1459.

A representation, as that term is understood in the law of marine insurance, is a statement made by the assured

to the underwriter, or by the underwriter to the assured, as to the past, present, or future existence of some fact or facts tending to affect the estimate by either party of the proposed risk. (1 Arnould Ins. *489; 1 Phill. Ins. § 524; 2 Duer. Ins. 656.)

By § 35, a representation, though immaterial, if intentionally false, avoids the policy. This provision is in accordance with the existing law. (3 Kent. Com. *283; 1 Arnould Ins. *500; 2 Duer Ins. 692, 693.)

By § 28 the materiality of a representation is to be determined, not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries.

But though the facts represented may be of a nature to lower the underwriter's estimate of the proposed risk (in which case such is presumed to have been their effect), still, in the absence of fraud, if it can be shown that they had no such effect, they will not be deemed material. Thus in *Flinn v. Headlam*, 9 Barn. & C. 691, it was represented that the ship would carry so much rock-salt as should put her in ballast trim; but before the policy was subscribed, the underwriter had been furnished by the assured with a certificate that the vessel was perfectly seaworthy, and fit to proceed on her voyage with a whole cargo of salt. The ship sailed, deeply laden with rock-salt, and was lost by a peril of the seas.

It was suggested, on the trial of the cause, by the Court to the jury, that perhaps the underwriters were guided in accepting the risk by the certificate of seaworthiness, and not by the representation of the assured as to the quantity of salt the vessel could carry. The jury apparently adopted this view of the case, as they found for the plaintiff. The Court refused to grant a new trial.

In *Planché v. Fletcher*, 1 Doug. 251, goods were insured against marine perils and capture, from London and

Ramsgate to Nantes, with liberty to call at Ostend. At this period, July, 1778, it was the custom for all ships leaving England with goods of British manufacture for France to clear for Ostend, without meaning to go there. This practice was resorted to in order to avoid payment of the duties prescribed for English goods imported direct from England to France, by making it appear that they were shipped at Ostend. The vessel sailed direct for Nantes, and was proceeding thither when she was seized by a King's cutter. The vessel was released, but the goods were forfeited.

Suit having been brought on the policy, the underwriter set up the misrepresentation in respect to the voyage as a defense to the action. But as it appeared that the vessel had only conformed to the general usage, with which the underwriter must be supposed to have been acquainted, the plaintiff recovered a verdict.

The statement constituting a representation may be—

1. A positive assertion by either party that a certain fact has or has not transpired, does or does not exist, or will or will not exist in the future.
2. A declaration of belief to the same effect.
3. A mere communication of information which the party communicating it has received from others, and which he communicates with notice of that fact.

Wherever the representation consists of a positive assertion or absolute promise, it would, if written on the face of the policy, constitute a warranty unless accompanied by a stipulation that it should only be considered as a representation, or by some expression indicating the intention of the parties not to regard it as a warranty. (3 Kent Com. 282; 2 Duer Ins. 644, 645.)

A very important distinction exists between the effect of a representation and that of a warranty, for while a substantial compliance with the terms of the former is all that is required, the latter must be fulfilled with rigorous exactness, though it will not be extended by construction

to include anything not necessarily implied in its terms.

Thus, in *Pawson v. Watson*, Cowp. 785, the vessel insured was represented as mounting "twelve guns and twenty men." This representation was not literally true; but the vessel carried a crew and armament equivalent or superior to the force represented. It was held by Lord Mansfield that there had been a substantial compliance with the representation, but that, had the facts represented been inserted in the policy so as to constitute a warranty, the variance between the statement and the fact would have avoided the policy.

In *Hyde v. Bruce*, 3 Doug. 213, the policy contained a warranty that the ship had twenty guns. It appeared in evidence that sixty men were required to man twenty guns, while the ship had only twenty-five men. It was contended by the underwriter that the warranty virtually included the requisite number of men to man the twenty guns. But the Court held otherwise.

The representation need not refer to any fact or circumstance involved in the risk. Thus, where a policy at a certain premium was effected in Scotland by means of a representation by the assured that he had insured the same risk in London at that premium, whereas, in truth, the premium which he had there paid was very much higher, the policy was held void, on the ground that the representation by which it was obtained, though not referring to the risk to be assumed, was false and fraudulent. (*Sibbald v. Hill*, 2 Dow's P. C. 263.)

In *Clason v. Smith*, 3 Wash. C. C. 157, the assured represented as follows: "We have no doubt that we could get the insurance effected in New York at that premium" (15 per cent.).

This assertion was false, the New York offices having declined the risk on any terms. The insurers issued their policy, after the above representation had been made, at a premium of 20 per cent.

The representation was deemed immaterial, on two grounds: 1. That the underwriters had not been influenced by it, as shown by the fact that they charged 20 per cent. premium, instead of 15. 2. That the representation was merely an expression of opinion.

Judge Duer (Ins. vol. 2, p. 712) questions the correctness of the latter ground of this decision, and suggests that a fraudulent misrepresentation as to the expectation of the assured in respect to a material fact should be held to avoid the policy.

The question of the materiality (as already defined) of a representation is for the jury, subject, of course, to the power of the Court to set aside their verdict and grant a new trial, if it is apparent that they have committed an error. Where the representation is plainly material to the risk, is proved false, and is not shown to have been without influence on the mind of the insurer, it seems to be within the authority of the Court to direct the jury to find a verdict in his favor. (See 2 Duer Ins. 689-691.)

If the express terms of the policy are inconsistent with those of a representation, the former will be held to indicate the true nature of the contract. Thus, if the ship makes a voyage the course of which is within the terms of the policy, though not in accordance with the antecedent representation made by the assured, this fact, unless the representation was fraudulent, furnishes no defense to an action on the policy. (See *Bize v. Fletcher*, 1 Doug. 278, 289.)

A representation once made is considered as continuing until notice is given the insurer that it is withdrawn. (*Dawson v. Atty*, 7 East, 367; 1 Arnould Ins. *530, *531.)

A misrepresentation of an existing fact vitiates the policy *ab initio*; but where the representation is promissory in its nature, and is made in good faith, the insured property is protected by the policy until the time of the falsification of the representation. (2 Duer Ins. 696; 3 Kent Com. *288.)

If a vessel represented as neutral, and actually so, and furnished with the necessary documents evidencing her neutral character, refuses, when visited by a belligerent, to exhibit her papers, and is therefore seized and detained, but afterwards released on establishing her neutral character, conceding her conduct to amount to a breach of the representation of neutrality, what is its effect on the policy? Suppose the vessel is afterwards lost by a peril insured against, can the assured recover? Judge Duer (2 Ins. 697) intimates that this transitory breach of the representation as to neutrality ought not to avoid the policy. But it may be suggested that the seizure and temporary detention of the vessel have varied the voyage, and that when the vessel afterwards resumes her course, the effect of the seizure and detention is similar to that produced by a deviation. (See *Wiggin v. Amory*, 13 Mass. 118; 1 Arnould Ins. *342.)

It is not necessary that a representation should be made in express terms. It may be implied from the language of the policy, or from that of another representation actually made. Thus, where it is represented that the vessel proposed for insurance "was on the coast (of Africa) on the 2nd of October," the representation will be construed as a declaration that, according to last advices, the vessel was there; and if the fact be that the owner at the time of effecting the policy knew that the vessel had left the coast of Africa on the 2nd of October, the misrepresentation will avoid the policy. (*Ratcliff v. Shoolbred*, Park Ins. 413.)

Where the policy on ship and cargo was "at and from Genoa to Dublin, the adventure to begin from the loading to equip for the voyage," held, that the terms of the policy plainly implied that the vessel had loaded or would load at Genoa. (*Hodgson v. Richardson*, 1 Black. W. 463.)

"To return five per cent. for convoy and arrival," held to imply a representation that there was a probability, or

at all events a possibility, that the vessel would sail with convoy. As the owner knew at the time of effecting the insurance that the vessel had sailed without convoy, the misrepresentation vitiated the policy. (*Reid v. Harvey*, 4 Dow's R. 97.)

Where the policy stated that the vessel was expected to be loaded between the 13th and 20th of September, held, that this statement implied that she had not, to the knowledge of the assured, been loaded before September 13th. (*Stewart v. Morrison*, *Miller on Ins.* 59. See *Kinlock v. Duguid*, 17 Fac. Dec. 108.)

Where a vessel is represented as American, and as having American papers on board, the representation will be held false, although the papers are on board, if they are not accessible to the master, so as to be used in case of belligerent visit for the protection of the vessel, and her capture ensues in consequence. (*Murray v. Alsop*, 3 Johns. Cas. 47. See also *Steel v. Lacy*, 3 Taunt. 285.)

Connection between representation and policy.—It is laid down in many of the decisions in insurance cases that the representation is no part of the policy, but something collateral to it; that it is the basis of the contract contained in the policy, and if untrue, the contract has no existence. When the representation is of a past or existing fact, the application of this doctrine is free from difficulty; but where it is promissory in its nature, and refers to the future, it is difficult to maintain, on the one hand, that if the representation fails of fulfillment, the policy is void *ab initio*, and on the other, that the policy is in force until the representation is falsified.

Judge Duer maintains, with great force and cogency, the doctrine that a representation as to the future, if not fulfilled, vitiates the policy; that its effect is similar to that of a warranty as to the future, except that its terms are not construed so rigorously, nor is it required to be fulfilled with the same precise accuracy. It is construed more liberally, and requires only a substantial fulfillment.

It is held by the Supreme Court of Massachusetts that promissory representations, properly speaking, do not exist. That a representation is always an assertion of a past or existing fact, and the policy is conditioned on the truth of such assertion. Hence in case of its falsehood, the policy has no legal existence. In respect to what are called promissory representations, they have (except when fraudulently made) no effect on the policy, cannot qualify its provisions in any manner, and cannot be introduced in evidence to modify any of its terms or conditions. When fraudulently made, the fraud vitiates the policy. When free from fraud, the so-called promissory representation is a mere expression of the intention of the assured existing at the time of effecting the policy, which he is at liberty afterwards to change, should he desire to do so. If it is intended to bind the assured to the fulfillment of any condition of the contract of insurance, such condition must be inserted in the policy.

For the views of Judge Duer on this subject, see 2 Duer Ins. p. 646, § 3, and note 2, pp. 721-738. Mr. Arnould, 1 Ins. *505, *506, and Chancellor Kent, 3 Com. *284, note *a*, seem to concur in opinion with Judge Duer.

For the Massachusetts view of the case, see *Bryant v. Ocean Ins. Co.* 22 Pick. 201; and *Kimball v. Ætna Ins. Co.* 9 Allen, 550. See also the opinion of Chancellor Walworth of New York in *Alston v. Mechanics' M. I. Co.* 4 Hill, 329.

A representation which is inconsistent with the policy is superseded by it, and is therefore of no force; but a representation which only modifies the effect of the policy, without contradicting its terms, is admissible in evidence for the purpose of explaining the true nature of the agreement; and this, whether made in writing or orally. (1 Arnould Ins. *499; 2 Duer Ins. p. 658, § 10.)

Where the voyage described in the policy was "at and from Madeira to Santos, with liberty to touch at the Cape de Verde Isles," and the vessel, instead of merely touch-

ing, stayed at the Cape de Verde Isles to take in salt, and was therefore (as the law was then held), on the face of the policy, guilty of a deviation in so doing, evidence was given that, at the time of effecting the policy, the underwriter was informed that the vessel was to touch at the Cape de Verde Isles for the purpose specified. (*Urquhart v. Bernard*, 4 Taunt. 450.)

Where a voyage was stated in the policy to be "from London to Berbice," evidence offered of a letter shown to the underwriter at the time of effecting the policy, stating that the vessel was at sea, out of the direct course from London to Berbice, with the view of showing that the vessel was insured from the place at sea where the letter was written to Berbice, was rejected as contradicting the terms of the policy. (*Redman v. Lowdon*, 5 Taunt. 462.)

Classification of representations.—Positive representations are either affirmative or promissory.

A representation of either class will, it seems, if false vitiate the policy. It is universally conceded that this is true of affirmative representations. Authorities differ, as has been already explained, in respect to the effect of promissory representations, false though not fraudulent, on the policy. (1 Arnould, *504, *505; 2 Duer Ins. 657.)

A representation which, properly construed, is merely one of expectation or belief or opinion will not, if honestly made, avoid the policy, though it should fail of fulfillment. If the allegation of the existence of such expectation or belief or opinion be true, the representation can in no just sense be characterized as false. If fraudulent, it vitiates the policy. (1 Arnould Ins. *507, *508. See *Dennison v. Thomaston M. I. Co.* 20 Me. 125; *Anderson v. Pacific M. & F. I. Co.* Law R. 7 Com. P. 65.) •

Even representations not expressly qualified by the assertion of expectation or belief or opinion will be regarded as if they were so qualified, wherever the circumstances show that they were so intended, and should have

been so understood. Thus, while the statement of the *owner* of a vessel as to her present locality, engagements, time of sailing, etc., will ordinarily be regarded as a positive assertion, a similar statement by an insurance broker, or a shipper of cargo, may well receive a different construction. (See 1 Arnould Ins. *509-*512, citing *Bouden v. Vaughan*, 10 East, 415; *Hubbard v. Glover*, 3 Camp. 313; *Brine v. Featherstone*, 4 Taunt. 867; *Rice v. New England M. I. Co.* 4 Pick. 439.) But where the representation, by whomsoever made, states positively and absolutely the safety of the ship on a given date, it will, if false, avoid the policy. (*McDowell v. Fraser*, 1 Doug. 260.)

Where the assured makes a representation to the underwriter, informing him at the same time that it is made on the information of others, or where he submits such information in its whole extent to the underwriter, he is ordinarily responsible only for the good faith and correctness of his own statement to the underwriter, and not for the truth or accuracy of the matters included in the representation. (2 Duer Ins. 703.)

It is implied, however, by the mere fact of such a communication, that the assured does not know or believe it to be false, and has no reason to discredit it. Should he possess other information, the tendency of which, if imparted to the underwriter, would be to induce him to think less favorably of the matters represented, he cannot withhold it without being guilty of a concealment. (2 Duer Ins. 704; *Rickards v. Murdock*, 10 Barn. & C. 527; *Stewart v. Morrison*, 8 Fac. Dec. 102.)

If the person from whom the assured derives his information occupy such a relation to the assured as to make the latter answerable for his statements, the effect of a misrepresentation by him will be the same as if made by the assured on his own responsibility. (*Fitzherbert v. Mather*, 1 Term Rep. 12; *Dennistoun v. Lillie*, 3 Bligh, 202; *Gladstone v. King*, 1 Maule & S. 35; *Gen. Int. Ins. Co. v. Ruggles*, 4 Mason, 74; 12 Wheat. 408.)

Materiality.—The question of the materiality of a representation must depend on the particular circumstances of the case in which the question arises. The criterion of the materiality of a representation is its influence on the mind of the party to whom it is made (usually the underwriter) in inducing him to enter into the contract.

Thus, misstatements as to the age of the vessel, as to her national character, as to her armament in time of hostilities, as to the nature of her cargo, the time of her sailing, the time when she was last seen, whether she was in port or at sea at a certain date, may all be material in the sense of that term as understood in respect to representations in the law of marine insurance.

It is sufficient if a representation be equitably and substantially true. (*DeHahn v. Hartley*, 1 Term R. 345.) An exact compliance with its terms is held to be unnecessary. If the variance between the actual fact and the representation be too slight to justify the belief that had it been known to the party to whom the representation was made it would have influenced his action in respect to the policy, the representation, if honestly made, is deemed true. If the actual risk is no greater than the risk represented, and the representation was made without any fraudulent intent, the contract remains good. (1 Arnould Ins. *520-526; 3 Kent Com. *282.)

For illustrations of the doctrine of substantial compliance with the representation, see the following cases: *Pawson v. Watson*, Cowp. 785; *Von Tugeln v. Dubois*, 2 Camp. 151; *Nonnen v. Kettlewell*, 16 East, 176; *Allen v. Charlestown M. F. Ins. Co.* 5 Gray, 384; *Underhill v. Agawam F. I. Co.* 6 Cush. 440; *Bell v. Marine Ins. Co.* 8 Serg. & R. 98; *Dennison v. Thomaston M. I. Co.* 20 Me. 125; *Ins. Co. of North America v. McDowell*, 50 Ill. 120; *Alexander v. Campbell*, 41 Law J. Ch. 478.

Waiver and withdrawal of representation.—A representation is waived by the insertion in the policy of anything inconsistent with it. In such case, the policy

supersedes the representation, and expresses the final intention of the parties. When the representation is in direct conflict with the terms of the policy, so that it cannot be reconciled with them, it must be entirely disregarded. (1 Phill. Ins. § 660; 2 Duer Ins. 258.)

In respect, however, to promissory representations (as in *Bize v. Fletcher*, 1 Doug. 278), the representation, though inconsistent with the terms of the policy, may be taken into consideration for the purpose of determining whether it was made in good faith, with an intention of fulfilling it, or whether it was designedly false and fraudulent; in which latter case it will avoid the policy. (2 Duer Ins. 665.) As a representation is important only in aiding the party to whom it is made to determine the character and extent of the risk involved in the proposed insurance, it is clear that before the contract of insurance is entered into, the representation may be withdrawn, and it will then cease to have any effect on the policy, should one afterward be effected. (1 Arnould Ins. *524; *Carter v. Boehm*, 3 Burr. 1905; *Edwards v. Footner*, 1 Cowp. 530.)

Promissory representations—Non-performance, when immaterial.—Mr. Arnould and Judge Duer concur in the opinion, that, in the case of promissory representations, if they are falsified after the policy has attached, by an act of the home government, by irresistible force or unavoidable accident, the validity of the contract and the liability of the underwriter will not be affected thereby. Thus where the government to which a vessel represented as neutral belongs becomes belligerent after the policy has attached and before it has expired, this, although materially affecting the risks, would not avoid the policy. (1 Arnould Ins. *526; 2 Duer Ins. 699.)

No adjudged cases directly in point are cited, however, by either of these learned writers as authority in support of their views. As to the illustration in respect to the

representation of the neutrality of an insured vessel, it may be observed that the representation is fulfilled if the vessel be neutral at the time the risk commences. The assured does not, by such a representation, guarantee the continuance of the neutral character of the vessel during the period covered by the policy. (*Eden v. Parkinson*, 1 Doug. 732; *Tyson v. Gurney*, 3 Term Rep. 477.)

But if such a representation were regarded as a promissory warranty extending through the period included in the policy, is it true that if it were falsified by the act of the government to which both insurer and insured belonged the underwriter would still remain liable on his policy? The affirmative answer to this question seems open to doubt, tested by legal analogies drawn from other cases of contract. (See *Scott v. Libby*, 2 Johns. 340; *Hills v. Sughrue*, 15 Mees. & W. 253; *Burrill v. Cleeman*, 17 Johns. 72; *Marquis of Bute v. Thompson*, 13 Mees. & W. 487; *Abbott on Shipping*, (452), (468); *Sjoerds v. Luscombe*, 16 East, 201; *The Harriman*, 9 Wall. 161.)

If during a state of war it was represented that an insured vessel would sail with convoy, and peace should be declared before the sailing of the vessel, so that convoy would be equally unnecessary and unattainable, the representation would be considered superseded by the return of peace. As the object of the convoy is to protect the vessel from hostilities, the representation may be said to be substantially fulfilled, when, hostilities being no longer in existence, no convoy is furnished for protection against them. (See 2 Duer Ins. 702.)

Of the construction of a representation.—Representations are construed liberally with the view of effectuating the intention of the parties to the policy. Expressed, as they frequently are, in loose and inexact phraseology, a strict construction of their terms would often do violence to their real meaning, and defeat the object which they were designed to accomplish. In ascertaining the fair signification of a representation, regard

must be had to the relation of the party who makes it to the subject of the insurance, to his means of knowledge in respect to the matter represented, and to any other circumstance calculated to explain the meaning of his language. Thus, as has already been seen, a representation, though made in unqualified terms, will be regarded as a mere expression of opinion when the attendant circumstances lead to the conclusion that nothing more than this was intended. (*Bowden v. Vaughan*, 10 East, 415; *Hubbard v. Glover*, 3 Camp. 313; *Alsop v. Coit*, 12 Mass. 40.)

A representation, though in terms referring only to the present, is often manifestly intended to include the future; and whenever this is apparent, it will be construed accordingly. As when a representation is made that a ship carries a certain armament, or has no contraband cargo on board, these representations are justly held to apply to the vessel during the period covered by the policy. (See 1 *Arnould*, *502; 2 *Duer*, 657.)

A representation will be held to include all that it implies, or that can fairly be inferred from its terms. Thus where a vessel is, by direction of the owner, represented by an insurance broker as having been on the coast of Africa on a certain date, though the owner knew she had since sailed, as the representation fairly implied that the vessel was there when last heard of, the policy was held void for misrepresentation. (*Ratcliff v. Shoolbred*, 1 *Park Ins.* 413.)

Where the representation was that the ship was "at Elsineur on the 26th of July, all well," though she had left that day six hours before the assured, who had encountered a long and stormy passage, the policy was held void; the natural inference from the representation being that the assured had left the ship well at Elsineur at the time of his departure. (*Kirby v. Smith*, 1 *Barn. & Ald.* 672.)

So if a ship is represented as neutral, this implies that she is properly documented as such. (*Christie v. Secretan*, 8 *Term Rep.* 192; *Le Cheminaut v. Pearson*, 4 *Taunt.* 367, 379.)

In England, where marine policies are usually signed by successive underwriters, it is held that any misrepresentation made to the first underwriter will not only vitiate the policy as to him, but also as to the other underwriters, who are presumed to have been influenced in signing the policy by the fact that the first underwriter had accepted the risk. The rule is of little practical consequence in the United States, where each insurer generally issues his own separate policy; and in England it seems to be regarded by the courts with some disfavor. (See 2 Duer Ins. 675.)

So a fraudulent collusion between the assured and the first underwriter, in pursuance of which a policy is effected with no intention of carrying it out according to its terms, will vitiate the policy as to subsequent underwriters who may have been imposed upon by it. (*Wilson v. Duckett*, 3 Burr. 1361.)

No representation need be made in respect to matters covered by an implied warranty of an existing fact, as the existence of every fact included in such warranty becomes, on issuing the policy, a condition precedent to the validity of the contract. If, for example, the vessel is unseaworthy when the risk commences, the policy is void, except in the case of time policies, as to which, by the law of England, no warranty of seaworthiness is implied. (See *ante*, p. 59.)

Effect of representation on contract of insurance.—A representation may, however, qualify an implied warranty; thus, suppose it to be essential to the seaworthiness of a vessel that the mate should be competent to navigate her on her voyage, without the superintendence or direction of the master; and that the underwriter should be informed, in a given case, that the mate was not thus competent. This representation, while leaving the warranty of seaworthiness intact in all other respects, would modify it in respect to the capacity of the mate. "There is no law (although upon grounds

of public policy such a law might well be enacted) prohibiting the insurance of an unseaworthy vessel; and if the insurer is willing that the policy shall attach on such a vessel, upon a full representation of her condition and defects, I know of no reason why effect should not be given to the agreement, although not inserted in the policy, but made by parol." (2 Duer Ins. 671. See *Parfitt v. Thompson*, 13 Mees. & W. 392; *Phillips v. Nairne*, 16 Law J. Com. P. 194.)

In like manner, a representation may supersede a general or special usage. For as the usage only becomes a part of the contract on the presumption that the parties have tacitly agreed to adopt it as such, this rule cannot apply where the evidence disproves the existence of such a presumption.

The rate of premium is frequently important in determining whether the underwriter has trusted to the representation. If, notwithstanding a very favorable representation of the risk, a very high premium is exacted, it will naturally be presumed that the underwriter relied on his own judgment, and not on the statements of the assured. So if the risk was known to the assured to be very great, yet the policy was effected at the usual premium, a presumption unfavorable to the sufficiency of the representation will arise. (*Court v. Martineau*, 3 Doug. 161; *Bridges v. Hunter*, 1 Maule & S. 15.)

ARTICLE V.

IMPLIED WARRANTIES.

- § 107. Warranty of seaworthiness.
- § 108. Seaworthiness, what.
- § 109. At what time seaworthiness must exist.
- § 110. What things are required to constitute seaworthiness.
- § 111. Different degrees of seaworthiness at different stages of the voyage.
- § 112. Unseaworthiness during the voyage.
- § 113. Seaworthiness for purposes of insurance on cargo.
- § 114. Neutral papers.

§ 107. *In every marine insurance upon a ship or freight, or freightage, or upon anything which is the subject of marine insurance, a warranty is implied that the ship is seaworthy.*

Civ. Code Cal. 2681. N. Y. Civ. Code, 1460.

But to what period does this warranty refer? If a vessel is insured at and from a certain port, it is not necessary that while she is lying in port, free from the dangers of actual navigation, she should be in such a condition as to repairs, equipments, crew, and other essentials, as if she were engaged in the prosecution of her voyage. It is enough if, while lying in port, she is in a fit condition to perform the service there required of her, and to encounter the ordinary perils of her position. (*Taylor v. Lowell*, 3 Mass. 331; *Paddock v. Franklin Ins. Co.* 11 Pick. 227, 231; *Parmeter v. Cousins*, 2 Camp. 235.)

The condition that a vessel shall be seaworthy for the voyage does not attach until she sails. If, therefore, a vessel is insured at and from a port, the policy will attach to and protect her while in port, even though she may need repairs to make her seaworthy for the voyage. (*Annen v. Woodman*, 3 Taunt. 299; *Oliverson v. Loughman*, cited 2 Barn. & Ald. 322; *McLanahan v. Universal Ins. Co.* 1 Peters, 184.)

It has been intimated that the implied warranty of seaworthiness is not violated so as to defeat the policy by a mere temporary defect at the commencement of the voyage, which is promptly remedied before the occurrence of any disaster. (*Weir v. Aberdeen*, 2 Barn. & Ald. 324. See *Deblois v. Ocean Ins. Co.* 16 Pick. 303; *Chase v. Eagle Ins. Co.* 5 id. 51; *United States v. Hunt*, 2 Story, 121; *Lapene v. Sun Mutual Ins. Co.* 8 La. An. 1; *Barret v. New Orleans Ins. Co.* id. 3; id. 99.)

But the decision in the case of *Weir v. Aberdeen*, which had been regarded as the chief authority for this modification of the general rule in respect to the warranty of seaworthiness, was declared by the Privy Council, in the case of the *Quebec M. I. Co. v. The Commercial Bank of*

Canada, Law R. 4 P. C. 234, to sanction no such doctrine. The true *ratio decidendi* of that case, as there stated, was that the underwriters had assented in writing in the policy to maintain their liability, notwithstanding the violation of the warranty. The case of *Forshaw v. Chabert*, 3 Brod. & B. 158, was also cited by the Court for the purpose of showing that the seaworthiness of the ship at the commencement of the voyage was an essential condition of the validity of the policy, and the supposed doctrine of *Weir v. Aberdeen* was characterized as "a proposition of perilous latitude." (See, however, 3 Kent Com. *289; 1 Phill. Ins. art. 726.)

§ 108. *A ship is seaworthy when reasonably fit to perform the services, and to encounter the ordinary perils of the voyage contemplated by the parties to the policy.*

Civ. Code Cal. 2882. N. Y. Civ. Code, 1461.

Definition of seaworthiness.—In *Small v. Gibson*, 4 H. L. Cas. 384, Erle, J., thus defines seaworthiness: "A ship, before setting out on a voyage, is seaworthy if it is fit in the degree which a prudent owner uninsured would require to meet the perils of the service it is then engaged in, and would continue so during the voyage, unless it met with extraordinary damages." (See also definition in *Daniels v. Harris*, Law R. 10 Com. P. 1.)

It is suggested by Mr. Justice Story, in *Tidmarsh v. Washington Ins. Co.* 4 Mason, 441, that the seaworthiness of a foreign vessel insured while in a port of the country to which she belongs is to be tested by the standard of seaworthiness which prevails there.

Standard of seaworthiness.—There can, of course, be no absolute, unvarying standard of seaworthiness. The ability of the vessel to encounter the ordinary perils to which she may be exposed must vary with the exigencies of each particular case. A vessel that might be seaworthy for a voyage across the Atlantic might be unseaworthy for a whaling voyage to the south seas or the

Arctic Ocean. A ship seaworthy for a summer voyage might not be so for a voyage in winter. The essentials to a condition of seaworthiness may not be the same in lake and river navigation as in ocean navigation. The standard of seaworthiness to-day is in many respects higher than that of the last century. Whatever are the services to be performed, and the ordinary perils to be encountered, the vessel, if reasonably fit to perform the former and encounter the latter, is seaworthy; if not, she is unseaworthy. The vessel, regard being had to the service in which she is employed, the waters she is to navigate, and the season in which the voyage is to be made, must be properly built, rigged, furnished, and equipped, properly loaded, and provided with a competent master, officers, and crew. It has been held, in respect to steamships and vessels of large size, that they must not only have a competent master, but, in general, some other person also who is qualified to act as master in case of emergency. (*The Niagara v. Cordes*, 21 How. 7; *Copeland v. N. E. Marine Ins. Co.* 2 Met. 446; *Clifford v. Hunter*, 3 Car. & P. 16. But see *Draper v. Com. Ins. Co.* 4 Duer, 234; 21 N. Y. 378.) "This," says Chancellor Kent, 3 Com. *287, note a, "is a new doctrine, and it may be questioned as a general rule applicable to all voyages." This rule does not appear to be recognized as a rule of law in England, but the question of seaworthiness in such cases is a question of fact. (*Clifford v. Hunter*, 3 Car. & P. 16.)

Scope of the warranty of seaworthiness.—It has been decided in Pennsylvania that, in a policy on boats to be towed down the Ohio, there is an implied warranty of the sufficiency of the tug-boat. (*Merchants' Ins. Co. v. Algeo*, 31 Pa. St. 446.)

In a policy of insurance on deck cargo, it is not a compliance with the warranty of seaworthiness that the ship is fit to encounter ordinary sea weather with safety to herself, because such deck cargo is such as may be read-

ily jettisoned in rough weather. She should be able to encounter such weather without resorting to a jettison of the deck cargo. (*Daniels v. Harris*, Law R. 10 Com. P. 1.)

If the cargo be so improperly stowed that the ordinary perils of the sea displace it, and the ship is thereby injured or lost, the ship is deemed to have been unseaworthy when loaded. (*Kopitoff v. Wilson*, L. R. 1 Q. B. D. 377.)

If a ship is at sea at the commencement of a risk on cargo, there is no implied warranty on the part of the assured that the vessel is seaworthy. (*Macy v. Mutual M. Ins. Co.* 12 Gray, 497.)

In *Turnbull v. Janson*, 36 L. T. N. S. 635, it was held that, when a vessel built for inland navigation is insured on a sea voyage, there is an implied warranty that she shall be made as seaworthy as such a vessel can be made by ordinary available means.

If, at the time of insuring a ship, "lost or not lost," she is in her home port, the implied warranty of seaworthiness is held to exist; but not so if she is then in a distant ocean. (*Rouse v. Ins. Co.* 3 Wall. Jr. 367.)

§ 109. *An implied warranty of seaworthiness is complied with if the ship be seaworthy at the time of the commencement of the risk, except in the following cases:*

1. *When the insurance is made for a specified length of time, the implied warranty is not complied with unless the ship be seaworthy at the commencement of every voyage she may undertake during that time; and*

2. *When the insurance is upon the cargo, which, by the terms of the policy, or the description of the voyage or the established custom of the trade, is to be transshipped at an intermediate port, the implied warranty is not complied with unless each vessel upon which the cargo is shipped or transshipped be seaworthy at the commencement of its particular voyage.*

Civ. Code Cal. 2683. N. Y. Civ. Code, 1462.

When the insurance is on a voyage from one specified port or place to another, the Code adopts the existing rule, which holds that the warranty of seaworthiness as a condition precedent is complied with if the ship be seaworthy at the commencement of the risk. (See note to § 107.)

According to the case of *Dixon v. Sadler*, frequently cited in the English courts, 5 Mees. & W. 405, affirmed 8 id. 895, "if the vessel, crew, and equipments be originally sufficient, the assured has done all that he contracted to do, and is not responsible for the subsequent deficiency occasioned by any neglect or misconduct of the master or crew; and this principle," added the Court, "prevents many nice and difficult inquiries, and causes a more complete indemnity, which is the object of the contract of insurance."

In the case of *Biccard v. Shepherd*, 14 Moore P. C. C. 471, insurance was effected on cargo on the ship *Wellington*, at and from the anchorage off Hondeklip Bay and Port Nolloth to Swansea, to commence from the loading of the goods on board the ship at and from the above ports, and until discharge of the same at Swansea.

The vessel left Hondeklip Bay seaworthy, with 150 tons of cargo, and proceeded to Port Nolloth, where she received 250 tons more. This additional cargo caused her to leak to such a degree that when she sailed from Port Nolloth she had ceased to be seaworthy. She was afterwards lost, and the assured sued to recover a total loss on cargo. But the Court held that the policy covered two sea voyages, beginning at different times and places, and that the warranty of seaworthiness applied separately to each. Hence, judgment was given for the assured as to the 150 tons only, the vessel having been unseaworthy when the risk commenced as to the 250 tons.

In *Redman v. Wilson*, 14 Mees. & W. 476, the ship was insured from London to Sierra Leone, while there, and back to the port of discharge in the United Kingdom.

The ship arrived at Sierra Leone, and while in the neighboring waters, and under the protection of the policy, began to load a return cargo of timber. She was probably injured in the process of loading, as, after being fully laden, she was found to be leaking. A survey was held, and part of her cargo was discharged. The leak increased, and on further examination she was found to be unseaworthy, and was run ashore to prevent her from sinking and to save the cargo. The insured claimed for a constructive total loss.

The Court held, that, as the ship was seaworthy when she sailed, and the immediate cause of the loss was a peril of the sea, the insurer was liable, though the negligence of those who loaded the ship might have been the cause of the unseaworthiness which resulted in her loss.

In *Biccard v. Shepherd*, last cited, the insurance was in different shipments of cargo at different periods, each requiring the condition of seaworthiness at the time of the commencement of the risk; while in this case the insurance was on the ship for one voyage, and the seaworthiness of the ship at the commencement of the voyage satisfied the conditions of the warranty.

In *The Quebec M. I. Co. v. Commercial Bank of Canada*, Law R. 3 P. C. 234, the vessel was insured from Montreal to Halifax; the first part of the voyage being river navigation, and the latter sea navigation.

The insured vessel was a steamer, and owing to some defect in her boiler, which was aggravated in sea navigation by the additional pressure of the salt water, she became, after leaving the river St. Lawrence, unmanageable, and was obliged to put into port. After considerable delay, partly owing to the necessary work on her and partly to the state of the tides, she resumed her voyage, but was lost before reaching Halifax.

It was held that the policy was a sea policy as well as a river policy, and that, as the vessel when the risk of sea navigation commenced was not seaworthy for that kind

of navigation, the warranty of seaworthiness had not been complied with, and the insurer therefore was not liable.

Where, as in the case just cited, the voyage is composed of distinct portions, as, for example, the first part river navigation, the latter part ocean navigation, the warranty of seaworthiness applies separately to the different portions of the voyage; and if the vessel sails in proper condition for the first part, the warranty is fulfilled *pro tanto*, and the vessel is entitled, before entering on the second part of the voyage, to such delay as may be necessary, in the exercise of due and reasonable diligence, to render her seaworthy for the residue of the voyage. (*Bouillon v. Lupton*, 15 Com. B. (109 E. C. L.) 113. See *Van Valkenburgh v. Astor M. I. Co.* 1 Bosw. 61.)

The English authorities, as the foregoing citations show, do not regard the warranty of seaworthiness as a continuing warranty. If, therefore, the vessel should subsequently be in an unseaworthy condition through the negligence of the captain, and a loss should occur while this condition existed, the insurer would nevertheless be liable, unless, indeed, the negligence of the captain should amount to barratry, and that peril was covered by the policy. (See also, *Shore v. Bentall*, 7 Barn. & C. 798, note; *Walker v. Maitland*, 5 Barn. & Ald. 171; *Bishop v. Pentland*, 7 Barn. & C. 219.)

But the doctrine of the American cases is that it is the duty of the master, if the ship becomes unseaworthy, to exercise proper diligence in restoring her to a seaworthy condition; and if after the master, as the representative of the owner, has had an opportunity of rendering her seaworthy a loss occurs in consequence of his neglect to do so, the underwriter is not responsible. (*Paddock v. Franklin Ins. Co.* 11 Pick. 234, and cases therein cited. See, however, *Starbuck v. New England M. I. Co.* 19 Pick. 198; 3 Kent Com. *288; *American Ins. Co. v. Ogden*, 20 Wend. 287, 294; *Copeland v. N. E. Marine Ins. Co.* 2 Met. 432, 437.)

It is difficult to draw the line of distinction between those duties of the master in the management, navigation, and general superintendence of the vessel, whether at sea or at an intermediate port, which are performed simply as the *dominus navis*, and those which are to be ascribed to him as the representative of the owner personally. In commenting on the case of *Sadler v. Dixon*, 8 Mees. & W. 895, Chief Justice Shaw, in *Copeland v. New England M. I. Co.* 2 Met. 443, adverted to such a distinction as a limitation on the doctrine laid down in that case.

The negligent omission of the master to repair a vessel at an intermediate port, before pursuing his voyage, has sometimes been considered as imputable to the owner personally, and consequently as discharging the insurer from any liability for loss or damage consequent thereon. (*Putnam v. Wood*, 3 Mass. 481; *Paddock v. Franklin Ins. Co.* 11 Pick. 227.)

This distinction does not seem to be recognized in the English cases (*Biccard v. Shepherd*, 14 Moore P. C. C. 471; *Redman v. Wilson*, 14 Mees. & W. 476), nor has it apparently been always observed in the American decisions. (See *Copeland v. New England M. I. Co.* 2 Met. 443.)

Mr. Phillips (1 Ins. § 733), after reviewing the authorities on the subject, announces the better doctrine to be (in conformity with *Dixon v. Sadler*, *supra*) that "where the vessel is seaworthy in the outset, loss by perils insured against consequent upon subsequent unseaworthiness, occasioned by the negligence or mistakes of the master and crew, without fraud, is at the risk of the underwriters."

It is well settled in the law of fire insurance, that where a loss is caused by the peril insured against, the insurer cannot, under the ordinary form of policy, avoid payment by proving that it was occasioned by the personal negligence of the assured. (*May on Insurance*, § 408; *Wood on Fire Insurance*, 221-229.) Is the rule otherwise in marine insurance? The opinion of the Court of Appeals

in *Sturm v. Atlantic Ins. Co.* 63 N. Y. 87, citing *Johnson v. Berkshire M. F. I. Co.* 4 Allen, 388, would seem to intimate that it is not.

Mr. Phillips (1 Ins. § 1046) remarks, "that where a loss by the perils insured against may have been remotely occasioned by the fault or negligence, or want of the greatest degree of vigilance, prudence, and forecast of the assured, acting *bona fide*, and without being aware of such consequence, there are not wanting authorities establishing the liability of the underwriters to make indemnity."

Time policies.—Much difference of opinion has existed in respect to the nature and extent of a warranty of seaworthiness in time policies.

It has been finally settled in England, after much discussion, that in this class of policies there is no implied warranty of seaworthiness. (*Dudgeon v. Pembroke*, L. R. 2 App. C. 284.)

In *Thompson v. Hopper*, 6 El. & B. 172, it was held to be no defense to an action on a time policy, alleging loss by perils of the sea, that the plaintiff, the ship-owner, knowingly, willfully, wrongfully, and improperly sent the ship loaded out to sea in an unseaworthy state, and when she was not in a fit and proper condition to go to sea. But that it was a good defense that the plaintiff knowingly, willfully, wrongfully, and improperly sent the ship to sea at a time when it was dangerous to go to sea in the state and condition in which the ship then was, and wrongfully and improperly caused and permitted the ship to be and remain on the high seas near to the seashore for a great length of time, in the state and condition aforesaid, and without a master, and without a proper crew to manage and navigate her on her said voyage, during which time the ship, by reason of the premises, was wrecked.

American rule as to time policies.—It is difficult to state with certainty the result of the American decisions on this point. Some cases seem to hold that

there is in time policies a warranty of seaworthiness at the commencement of the risk. (*Martin v. Fishing Ins. Co.* 20 Pick. 389; *Capen v. Washington Ins. Co.* 12 Cush. 517; *Hoxie v. Home Ins. Co.* 32 Conn. 21; *Hoxie v. Pacific M. I. Co.* 7 Allen, 211; *The American Ins. Co. v. Ogden*, 20 Wend. 287; *Rouse v. Ins. Co.* 3 Wall. Jr. 367.) In *Jones v. Ins. Co.* 2 Wall. C. C. R. 278, it was held in substance that the defense of unseaworthiness in an action on a time policy must allege that the loss was owing to the insufficiency of the vessel. An averment merely that the vessel left the port in which she was lying when the policy attached in an unseaworthy condition would constitute no defense. In *Capen v. Washington Ins. Co.* 12 Cush. 517, it was held that the warranty of seaworthiness in time policies is, that the vessel is in existence as a vessel not lost at the commencement of the risk, capable, if then in port, of being made useful for navigation; and wherever she may be, in a safe or suitable condition for a vessel to be in, that she is seaworthy when she first sails from port; and if at sea, that she has sailed in a seaworthy condition, and is so far safe as to be a proper subject of insurance when the risk attaches. But if the vessel was then lost, or a wreck, or had ceased to exist as a vessel, or was, if at sea, in a condition or under circumstances in which she could not on her arrival in port be made available by reasonable or suitable repairs and fitting for navigation, then there was no subject for the policy to take effect upon, and the contract would be void. Held, also, that there was no implied warranty at subsequent ports, but that the owners were obliged to render her seaworthy if possible; and if she sailed in an unseaworthy condition, and was lost in consequence of such default, the insured could not recover; but if she was lost by a peril insured against, not caused in whole or in part by such default, the underwriters would be liable.

In *Hoxie v. Pacific M. Ins. Co.* 7 Allen, 211, it was held,

in the learned opinion of Bigelow, C. J., that if a vessel when the insurance is effected on her under a time policy is in a foreign port, where any necessary repairs may be made, there is a warranty of seaworthiness both for the port and in setting out therefrom. (*Contra: Merchants' Ins. Co. v. Morrison*, 62 Ill. 242.)

When, at the period at which a time policy attaches, the vessel is near the end of a long cruise or voyage in distant seas, the warranty of seaworthiness will be liberally construed in favor of the assured. (*Paddock v. Franklin Ins. Co.* 11 Pick. 227.)

The rule adopted in § 109, subsection 1, in respect to the warranty of seaworthiness in time policies, seems more rigorous toward the assured than is consistent with the tenor of the decisions on this subject. "The implied warranty of seaworthiness" is understood to be a condition precedent to the contract of insurance. If the vessel is not seaworthy when the risk commences, the policy does not take effect. But if then seaworthy, the subsequent unseaworthiness of the vessel, owing to the fault or neglect of the master or mariners, will not effect a breach of this warranty, for that, as has been seen, is already fulfilled. Suppose a vessel insured November 1st, 1878, lost or not lost, from January 1st, 1878, to January 1st, 1879. If, prior to the date of the policy and during the period which it covers, she has undertaken any voyage in an unseaworthy condition, though she may have made it in safety, and may subsequently and before the date of the policy have been rendered seaworthy, the result would seem to be that, under § 109, the policy fails to take effect, because the implied warranty of seaworthiness is already broken.

The breach of a warranty that is to be fulfilled in future vitiates the policy from the time of the breach. If, therefore, the warranty of continuing seaworthiness be regarded as a warranty of this class, a breach of it would terminate the policy. So that if the vessel is lost after

being unseaworthy at the commencement of the second voyage undertaken during the period covered by the policy, the assured, under subsection 1 of § 109, is without redress, though the unseaworthiness may have been remedied before the loss, and may not have tended in the slightest degree to produce it.

Mr. Parsons, in discussing the doctrine of the warranty of seaworthiness in respect to time policies, remarks: "The true answer we take to be this: she (the ship) must be seaworthy at the beginning of the time; and this seaworthiness must be measured by the requirements of the circumstances of her position: one thing if she is then in port, perhaps undergoing repair; another thing if at sea, and so forth; that when she sails on her first voyage she must be seaworthy in the ordinary sense, and must be kept in repair, and made seaworthy at every subsequent stage and port, so far as that is reasonably possible, under the penalty of discharging the insurers in case a loss occurs by reason of an unseaworthiness which could have been repaired by the use of proper means. But if the loss is wholly unconnected with this subsequent unseaworthiness, then the insurers are not discharged. (2 Parsons Mar. Law, 147. See *Pope v. Swiss L. I. Co.* 6 Sawy. 533.)

Subsection 1 of § 109, on the contrary, makes the subsequent unseaworthiness through fault or neglect an absolute breach of the warranty, giving the underwriter the right to rescind the contract. (See §§ 64, 68.)

The effect of subsection 2 of § 109 seems to be to constitute every port of transshipment included in the course of the risk the initial point of a new voyage, and to require, whenever such new voyage is commenced, that the vessel shall be seaworthy. It was probably not intended that the want of seaworthiness in a vessel which has safely completed her particular voyage, and safely transshipped her cargo, should deprive the assured of the right to recover for a loss to such cargo sustained after such transshipment on board another vessel which was seaworthy

when she commenced her particular voyage. This subsection was probably intended to declare that, in the cases to which it refers, each portion of the voyage, so far as regards the seaworthiness of the vessel employed to make it, is to be regarded as nothing more or less than a separate voyage.

§ 110. *A warranty of seaworthiness extends not only to the condition of the structure of the ship itself, but requires that it be properly laden, and provided with a competent master, a sufficient number of competent officers and seamen, and the requisite appurtenances and equipments, such as ballast, cables and anchors, cordage and sails, food, water, fuel and lights, and other necessary or proper stores and implements for the voyage.*

Civ. Code Cal. 2684. N. Y. Civ. Code, 1463.

"Properly laden": see *Weir v. Aberdeen*, 2 Barn. & Ald. 320; *Chase v. Eagle Ins. Co.* 5 Pick. 51; *Deblois v. Ocean Ins. Co.* 16 Pick. 303. "Competent master"—"officers and seamen": *Forshaw v. Chabert*, 3 Brod. & B. 158; *Walden v. N. Y. F. I. Co.* 12 Johns. 128; *Tait v. Levi*, 14 East, 481; *Draper v. Comm. Ins. Co.* 4 Duer, 234; 21 N. Y. 378; *Copeland v. N. E. M. Ins. Co.* 2 Met. 432; *The Niagara v. Cordes*, 21 How. 7; *Clifford v. Hunter*, 1 Moody & M. 103. "Appurtenances and equipments": *Wilkie v. Geddes*, 3 Dow, 57; *Wedderburn v. Bell*, 1 Camp. 1; *Deblois v. Ocean Ins. Co.* 16 Pick. 303; *Fontaine v. Phoenix Ins. Co.* 10 Johns. 58; *Moses v. Sun Mutual Ins. Co.* 1 Duer, 159; *Kettell v. Wiggin*, 13 Mass. 68; *Quebec M. I. Co. v. Commercial Bank of Canada*, Law R. 3 P. C. 234.

§ 111. *Where different portions of the voyage contemplated by a policy differ in respect to the things requisite to make the ship seaworthy therefor, a warranty of seaworthiness is complied with if at the commencement of each portion the ship is seaworthy with reference to that portion.*

Civ. Code Cal. 2685. N. Y. Civ. Code, 1464.

Bouillon v. Lupton, 109 E. C. L. (15 Com. B.) 113; *Quebec M. I. Co. v. Commercial Bank of Canada*, Law R. 3

P. C. 234. See *Van Valkenburgh v. Astor M. I. Co.* 1 Bosw. 61.

There is no warranty that cargo shall be seaworthy; that is, in a condition to resist the ordinary perils to which cargo is exposed. In case of a loss on insured goods, it is no answer to allege that they were shipped in an unfit condition for transportation, unless the loss arose therefrom. (*Koebel v. Saunders*, 112 E. C. L. (17 Com. B.) 78; *Acatos v. Burns*, Law R. 3 Ex. D. 282.)

In *Lane v. Nixon*, Law R. 1 Com. P. 412, goods were insured from Liverpool to Melbourne, policy to continue until goods should be discharged and safely landed at Melbourne. Suit was brought on the policy. It was proved that the damage happened after the goods had been discharged from the vessel, and while they were in a lighter for the purpose of being conveyed ashore. The insurer contended that the lighter was unseaworthy, and that the damage was caused by such unseaworthiness. Held, that the assured did not warrant the seaworthiness of the lighter. (See *Van Valkenburgh v. Astor M. I. Co.* 1 Bosw. 61.)

If it be according to the ordinary course of custom at the port of discharge for the owner to employ a common public lighter to receive the goods, the policy will cover them until safely landed; but if the owner receives them in his own lighter, the risk is at an end. (3 Kent Com. *309; *Sparrow v. Carruthers*, 2 Strange, 1236; *Strong v. Natally*, 4 Bos. & P. 16; *Coggeshall v. American Ins. Co.* 3 Wend. 283.)

Burden of proof as to seaworthiness.—It was held in *Pickup v. Thames Ins. Co.* L. R. 3 Q. B. D. 594, that where the underwriter interposes the plea of unseaworthiness to a suit on the policy, the burden of proof throughout the trial is on him; and that it is error to charge, *as matter of law*, that where a very short time elapsed between the sailing of the vessel and her putting back from inability to proceed, without having experi-

enced any unusual perils of the sea, the burden of proof was shifted to the assured.

The rule in the United States seems to be, that in the case stated, a presumption of fact is created which shifts the burden of proof of seaworthiness on the assured. (*Patrick v. Hallett*, 3 Johns. Cas. 76; *Talcott v. Marine Ins. Co.* 5 Johns. 124; *Hudson v. Williamson*, 1 Const. Ct. Rep. 360; *The Union Ins. Co. v. Cadwell*, Dud. R. 263. See also *Flanagan v. Washington Ins. Co.* 7 Barr. 306; *Snethen v. Memphis Ins. Co.* 3 La. An. 474; *Rugely v. Sun Mut. Ins. Co. of N. Y.* 7 id. 279; *Walsh v. Washington Ins. Co.* 3 Rob. 202; 32 N. Y. 427, 436; *Myers v. Girard Ins. Co.* 26 Pa. St. 192; *S. P. Werk v. Leathers*, 1 Wood, 271; *Painter v. Merchants' M. M. Ins. Co.* 20 La. An. 100.

§ 112. *When a ship becomes unseaworthy during the voyage to which an insurance relates, an unreasonable delay in repairing the defect exonerates the insurer from liability for any loss arising therefrom.*

Civ. Code Cal. 2686. N. Y. Civ. Code, 1465.

Paddock v. Franklin Ins. Co. 11 Pick. 227; *Hollingworth v. Brodrick*, 7 Ad. & E. 40; *Am. Ins. Co. v. Ogden*, 20 Wend. 287; *Copeland v. N. E. M. Ins. Co.* 2 Met. 432; *Arnold v. Pacific M. Ins. Co.* 78 N. Y. 7, 16-19; *supra*, p. 234.

§ 113. *A ship which is seaworthy for the purpose of an insurance upon the ship may, nevertheless, by reason of being unfitted to receive the cargo, be unseaworthy for the purpose of insurance upon the cargo.*

Civ. Code Cal. 2687. N. Y. Civ. Code, 1466.

Taylor v. Lowell, 3 Mass. 331; 2 Parsons Mar. Law, 145.

In *Stanton v. Richardson*, Law R. 7 Com. P. 421, 9 Com. P. 390, the ship-owner covenanted with the charterer that the vessel should be a good risk for insurance. The charter party provided for a cargo of sugar, specifying different rates of freight for wet and dry sugar.

The vessel proceeded to her port of loading, and was pronounced a first-class risk, and an underwriter's certifi-

cate was obtained to that effect. She was then loaded by charterer with wet sugar, from which a large amount of moisture was drained. This accumulated in the hold, and mixing there with the ordinary drainage of the vessel, clogged the pumps and rendered them unserviceable, and so made the vessel, under the circumstances, unseaworthy. The sugar had to be and was removed. The charterer refused to reload it or to supply other cargo. Cross-actions were brought by ship-owner and charterer, and it was held that the ship-owner undertook by the charter party that the ship should be fit for a cargo of wet sugar, and consequently that the charterer was entitled to judgment in his favor in both actions.

In marine policies on cargo, there is, in addition to the warranty of seaworthiness, an implied condition that the goods will be stowed in the usual and customary place for goods of that description, and any violation of this condition, by which the risk is increased, vitiates the policy. (*Leitch v. Atlantic Mutual Ins. Co.* 66 N. Y. 100.)

In this case insurance was effected on "Mexican doubloons" on a voyage from Laguna *via* Minititlan to New York. It appeared from the evidence that the specie was placed in the "run" of the vessel, under the ballast. The vessel sailed from Laguna to Minititlan. There the outer cargo was discharged, the gold recounted, put back under the ballast, and the vessel loaded with mahogany and fustic. After leaving this port, the vessel sprung aleak and was abandoned.

It was proved on the trial that the stowage of the specie in the run of the vessel was unusual and improper; that the risk was thereby increased, and that the proper place was in or under the cabin. The Court held that the risk incurred was not the risk assumed, and that the policy never attached.

Goods carried on deck.—Goods which, by the established usage of trade, are carried on deck will be protected by a policy on cargo, in the absence of any stip-

ulation therein to the contrary. (*Da Costa v. Edmunds*, 4 Camp. 142; *Wadsworth v. Pacific Ins. Co.* 4 Wend. 34; *Taunton Copper Co. v. Merchants' Ins. Co.* 22 Pick. 108; *Milward v. Hibbert*, 3 Q. B. 120; *Allen v. St. Louis Ins. Co.* 12 Reporter, 54; *Harris v. Moody*, 4 Bosw. 210; 30 N. Y. 269; *Toledo Ins. Co. v. Speares*, 16 Ind. 52; *The Milwaukee Belle*, 2 Biss. 197, and note; *Merchants' and Manufacturers' Ins. Co. v. Shillito*, 15 Ohio St. 559. But see *Borland v. Merc. M. I. Co.* 46 N. Y. Sup. 433.)

But in the absence of such usage, goods on deck are not covered by a policy in the ordinary form. (1 *McLachlan's Arnould's Ins.* 26; 1 *Phill. Ins.* § 460. See *Woods v. Phoenix Ins. Co.* 12 Reporter, 231.)

Notice of such usage will be conclusively implied, if, from the description of the article, in connection with the nature of the voyage or the trade in which the vessel is engaged, the underwriter must be presumed to have known that it would be carried on deck. (*Taunton Copper Co. v. Merchants' Ins. Co.* 22 Pick. 108; *Rogers v. Mechanics' Ins. Co.* 1 Story, 603.)

§ 114. *Where the nationality or neutrality of a ship or cargo is expressly warranted, it is implied that the ship will carry the requisite documents to show such nationality or neutrality, and that it will not carry any documents which cast reasonable suspicion thereon.*

Civ. Code Cal. 2688. N. Y. Civ. Code, 1467.

As the object of the warranty is to protect the underwriter from liability for any arrest, detention, or capture that may arise from the actual or apparent belligerent character of the insured vessel or cargo, or the lack of evidence of its neutral character, it is proper that where, through the fault or negligence of the owner, the ship or cargo, though actually neutral, is seized, detained, or forfeited as hostile, the underwriter should not be held responsible for such seizure, detention, or forfeiture. (*Coolidge v. N. Y. F. Ins. Co.* 14 Johns. 314; *Higgins v.*

Livermore, 14 Mass. 106; Schwartz v. Ins. Co. of North America, 6 Binn. 378; Barker v. Phoenix Ins. Co. 8 Johns. 307; Goix v. Low, 1 Johns. Cas. 346; Blagge v. N. Y. Ins. Co. 1 Caines, 549; Smith v. Delaware Ins. Co. 3 Wash. C. C. 127; Barzillai v. Lewis, 3 Doug. 126; Rich. v. Parker, 7 Term Rep. 705.) As to suspicious documents: see Carrere v. Union Ins. Co. 3 Har. & J. 324; Livingston v. Maryland Ins. Co. 7 Cranch, 536; Horneyer v. Lushington, 15 East, 46; Oswell v. Vigne, 15 id. 70; Bell v. Bromfield, id. 364.

ARTICLE VI.

THE VOYAGE, AND DEVIATION.

- § 115. Voyage insured, how determined.
- § 116. Course of sailing, how determined.
- § 117. Deviation, what.
- § 118. When proper.
- § 119. When improper.
- § 120. Deviation exonerates the insurer.

§ 115. *When the voyage contemplated by a policy is described by the places of beginning and ending, the voyage insured is one which conforms to the course of sailing fixed by mercantile usage between those places.*

Civ. Code Cal. 2692. N. Y. Civ. Code, 1468.

"In almost all voyages, custom and long usage have prescribed a certain course of navigation as the safest, directest, and most expeditious mode of proceeding from one of the termini to the other. The course thus prescribed by usage is the lawful course of the voyage insured; and being a matter of general mercantile notoriety, is presumed to have been foreseen and contemplated by the parties to the policy at the time of entering into their contract, and is therefore considered as much to form a part of the policy as though it were in express terms set forth therein. (1 Arnould Ins. *340.)

The risk on a vessel under a policy to a place generally, without any provision as to her safety there, continues

until she is anchored at her port of destination in the usual place for the discharge of her cargo. (*Stone v. M. Ins. Co.* L. R. 1 Ex. D. 81; *Dickey v. United Ins. Co.* 11 Johns. 358.)

Marine policies usually provide that the insurance on the risk shall continue until the vessel shall be arrived and moored twenty-four hours in safety. This is held to mean arrival within the port, at the usual place of unloading, and in safety there from the perils covered by the policy during the time specified. (*Meigs v. Mutual M. Ins. Co.* 2 Cush. 439; *Bill v. Mason*, 6 Mass. 312.)

§ 116. *If the course of sailing is not fixed by mercantile usage, the voyage insured by a policy is the way between the places specified which, to a master of ordinary skill and discretion, would seem the most natural, direct, and advantageous.*

Civ. Code Cal. 2693. N. Y. Civ. Code, 1469.

The course actually taken must not be such that a master of ordinary skill and discretion would have avoided it. If the master be of ordinary skill and discretion, a presumption will exist that the course pursued by him was proper; and it will not be regarded as a deviation merely because another master, or even other masters, of ordinary skill and discretion would have taken another course. The deviation should be so obvious as to justify the underwriter in insisting that, in accepting the risk, he could not reasonably be presumed to have contemplated that the vessel would pursue the course actually taken. (See *Braziers v. Clapp*, 5 Mass. 1; *Gazzam v. Ohio Ins. Co.* 1 Wright, 202; *Turner v. Protection Ins. Co.* 25 Me. 140.)

§ 117. *Deviation is a departure from the course of the voyage insured, mentioned in the last two sections, or an unreasonable delay in pursuing the voyage, or the commencement of an entirely different voyage.*

Civ. Code Cal. 2694. N. Y. Civ. Code, 1470.

Established usage will justify a vessel in stopping at customary intermediate ports out of the direct course between the termini of the voyage, because the right to do so enters by implication into the contract of insurance. (*Cormack v. Gladstone*, 11 East, 347; *Salvador v. Hopkins*, 3 Burr. 1707; *Gregory v. Christie*, 3 Doug. 419; *Valance v. Dewar*, 1 Camp. 503; *Ougier v. Jennings*, id. 503; *Stewart v. Bell*, 5 Barn. & Ald. 238; *Folsom v. Manufacturers' Ins. Co.* 16 Gray, 463; *Folsom v. Merchants' Ins. Co.* 38 Me. 414; *Lockett v. Merchants' Ins. Co.* 10 Rob. (La.) 339.)

Where, however, the policy specifically prescribes the course of the voyage, any unnecessary deviation from that course will avoid the policy, even though the course actually taken may conform to established usage. Thus it was the custom for vessels sailing from Carron on the Clyde, with goods or freight for Hull, in going down the Frith of Forth to touch at different places, including the port of Leith, for the purpose of taking in and delivering goods. A shipper of goods intending to insure them from Carron to Hull, "to call as usual," received, through the mistake of his broker, a policy "from Carron to Hull, with liberty to call at Leith." The vessel passed by Leith without calling, but put into the port known as Morrison's Haven, which she left in safety, and after resuming the direct course of her voyage to Hull, was wrecked, losing all her cargo. It was held, in the House of Lords, that under the terms of the policy, which only permitted the vessel to touch at Leith, it was a deviation to put into Morrison's Haven. (*Elliott v. Wilson*, 7 Brown Parl. C. 459. See also *Hearne v. Marine Ins. Co.* 20 Wall. 488.)

When liberty is given in the policy to touch at certain specified ports of discharge, they must usually be visited in the order named in the policy. (*Beatson v. Haworth*, 6 Term Rep. 531.) Where the ports of discharge are not specifically named, the general rule is, that they must be

visited in their geographical order from the port of departure. (*Clason v. Simmonds*, cited 6 Term Rep. 533, note; *Andrews v. Mellish*, 5 Taunt. 502.)

But if there be any clear, well-established usage in respect to the order of touching either at specified or unspecified ports of discharge, the insured may follow it without being guilty of a deviation, unless such a course be in conflict with the express terms of the policy. (*Beatson v. Haworth*, 6 Term Rep. 531; *Gardner v. Senhouse*, 3 Taunt. 16.)

The description of the voyage contained in the policy is so construed as to effect the apparent intention of the parties, regard being had to the nature of the trade or adventure in which the vessel is engaged, the purpose of the voyage, and any other circumstance calculated to aid in the interpretation of the language employed. (*Mellish v. Andrews*, 2 Maule & S. 26; 5 Taunt. 495; *Lambert v. Liddard*, 5 id. 480; *Bragg v. Anderson*, 4 id. 229; *Dickey v. Baltimore Ins. Co.* 7 Cranch, 327; *Deblois v. Ocean Ins. Co.* 16 Pick. 303; *Middlewood v. Blakes*, 7 Term Rep. 164; *Maxwell v. Robinson*, 1 Johns. 333; *Kane v. Columbian Ins. Co.* 2 id. 265; *De Peyster v. Sun Mutual Ins. Co.* 19 N. Y. 272; *Child v. Sun Mutual Ins. Co.* 3 Sand. 26.)

A ship insured from St. Johns, N. B., "to Kingston and a market in Jamaica," sailed with orders directing her in a certain contingency, when off the east end of the island, to proceed direct to Port Maria; otherwise, to proceed to Kingston, sell so much of her cargo there as was salable, and then proceed with the residue to Port Maria. The vessel went direct to Port Maria, where she disposed of her cargo and shipped a return cargo, and then, without putting in at Kingston, commenced her return voyage to St. Johns, and while proceeding thither was lost by perils of the seas. Suit being brought on the policy, the defense of deviation was interposed. The Court held that the voyage described in the policy was in effect a voyage from St. Johns to Kingston, and any other port in Jamaica;

that the vessel was therefore under no obligation to go to Kingston, but might proceed to any other port in the island to find a market for her cargo, and might therefore proceed, as she did, to Port Maria. The voyage being within the terms of the policy, there was no deviation. (*Houston v. N. E. Ins. Co.* 5 Pick. 89, distinguished from *Middlewood v. Blakes*, 7 Term Rep. 162.)

The course and limits of the voyage having been ascertained by an examination of the policy, the assured is held to a strict compliance with them; the underwriter being liable only for losses incurred in the course of the precise voyage agreed on. (3 Kent Com. *312, and cases cited.)

In *Stevens v. The Comm. M. Ins. Co.* 26 N. Y. 397, the brig *Ida* was insured under a time policy from October 3rd, 1852, to October 3rd, 1853, then renewed to October 3rd, 1854. The brig was "warranted not to use foreign ports or places in the Gulf of Mexico." On the 8th of November, 1853, it was agreed between the insured and the underwriter as follows: "For the additional premium of two per cent., the brig *Ida* has permission to use the port of Laguna for her voyage, without prejudice to this insurance." On the 11th of December, 1853, the brig sailed in ballast from Martinique, in the West Indies, bound for Laguna, to load there for Marseilles. She did not enter there, because prevented by the custom-house officers, Laguna not being a port of entry. She then sailed for Sisal for the purpose of entering and paying tonnage duties, with the intention of returning to Laguna to load there. Shortly after anchoring at Sisal, she was blown ashore and lost during the period covered by the policy. From the 16th of March, 1852, to the 1st of June, 1853, Sisal was closed to foreign commerce, and vessels intending to enter it were required first to go and pay tonnage dues at some Mexican port open to foreign commerce.

Suit having been brought on the policy, the defense of deviation was interposed. The Court held that the voyage from Laguna to Sisal was not sanctioned by the terms

of the policy, and consequently that the assured could not recover. Although the vessel could not "use the port of Laguna for her voyage" without first going into some other Mexican port to pay tonnage duties, it was held that her entering Sisal for that purpose vitiated the policy, all foreign Mexican ports except Laguna being prohibited by the express terms of that instrument.

Where the policy contemplates that the vessel is to proceed to a designated place, there to load a cargo and carry it to the port of destination, it is not a deviation for the vessel, after loading, to proceed to the proper port of entry and there obtain a clearance for her port of destination.

In *Parsons v. Manufacturers' Ins. Co.* 16 Gray, 464, a vessel was insured "at and from Callao to Chincha Islands, and thence to New York." The vessel sailed from Callao to the Chincha Islands, and having there loaded a cargo of guano, returned to Callao for a clearance; sailed from Callao for New York, and was lost while proceeding to the latter place.

The underwriters insisted that going to Callao from the Chincha Islands was a deviation, which discharged them from liability on the policy.

It appeared on the trial that the Chincha Islands are a dependency of Peru, and the taking of cargoes of guano from them is a government monopoly. They are not a port of entry or clearance, and cargoes can only be taken by a permit to be obtained at Callao, and a clearance can only be procured at that port. The Court held, therefore, that it was competent for the jury to find, on the evidence, that a voyage from the Chincha Islands to New York included, by the usage of the trade, the right to return to Callao for a clearance, and that there was no deviation. The evidence, in effect, had a tendency to show that the only legal and customary route from the Chincha Islands to New York was through the port of Callao.

"On a passage" and "at sea."—In *Washington Ins. Co. v. White*, 103 Mass. 238, insurance was effected on a

ship for one year; if on a passage at the end of the year, to continue until arrival at port of destination. The vessel sailed from the Chincha Islands for Europe, and at the expiration of the year was in the port of Callao, 120 miles from the Chincha Islands. Held that the vessel was not then "on a passage," and that the policy expired at the close of the year.

A vessel lying at the Chincha Islands, and taking in cargo there, destined for the United States, is not then "at sea," within the meaning of a time policy insuring the vessel for one year; and "if then at sea," until her arrival at her port of destination. (*Cole v. Union M. I. Co.* 12 Gray, 501.)

Under a similar policy, if the vessel, at the expiration of the year, be at a place of trade for loading vessels, although the coast is there open entirely to the sea, and there is no haven, nor harbor, nor pilots, nor lighthouse, nor breakwater, nor custom-house, nor consul, the vessel is not then "at sea." (*Gookin v. New England M. M. Ins. Co.* 12 Gray, 501, 506. See *De Longuemere v. N. Y. F. I. Co.* 10 Johns. 120; *Same v. Firemen's Ins. Co.* 10 id. 126.)

Mention of termini not exclusive of usual ports.

—The statement in a policy of the ultimate and intermediate termini of the voyage does not prohibit stopping at other intermediate ports, which, by the course of navigation or the usage of trade, are usually entered in making the voyage. Thus, in *McCall v. The Sun Mutual Ins. Co.* 66 N. Y. 506, a vessel was insured "at and from Miramichi to Cape Breton, and at and from thence to New York, with privilege of carrying coal exceeding her tonnage." Insurance was effected November 26th, 1864, after the vessel had sailed from Miramichi under clearance for Big Glace Bay, a port in Cape Breton Island. The vessel arrived at North Sydney on the 23th of November, 1864, where she anchored, and remained until December 12th, when she sailed to Cow Bay; and while loading there with coal, on the 20th of the same month, was driven on the rocks, and met with a disaster.

It was proved on the trial that it was the usual custom for vessels bound to either Glace Bay or Cow Bay for coal, during the fall and winter months, to stop first at Sydney. The masters would then communicate overland with the agent of the coal mines, and ascertain when their vessels could be loaded; and when notified, would proceed to the port of lading and receive their cargo. This custom was established to avoid detaining vessels in an open roadstead, on a dangerous coast, during the stormy season of the year. The master of the vessel in question, the day after his arrival at Sydney, went to Big Glace Bay, but believing it to be an unsafe place to load, proceeded thence to Cow Bay, which he deemed safer and more convenient, and his vessel was there chartered for New York to carry coal.

Held, that the words of the policy indicated no purpose of limiting the vessel to, or excluding her from, using any particular port. "The right to select any port was the right intended to be secured to the insured by the indefinite words of the policy. The vessel was free to choose any customary port on the island for obtaining her cargo, and in going to the selected port, to make the voyage in the usual and customary manner. . . . The words "to a port in Cape Breton," used in the policy in question, construed in view of the object of the voyage, which it is fair to presume was known to the insurer, indicated a coaling port in that island, and the privilege of the policy was not exhausted by going into Sydney for safe anchorage, according to the usual custom. The Court distinguishes this case from that of *Hearne v. The New England M. I. Co.* 20 Wall. 489, by remarking that the proof of usage there offered would have contradicted the terms of the contract.

Any unauthorized deviation fatal.—The shortness of the time, or of the distance of a deviation, makes no difference in its effect on the contract; if voluntary and without necessity, it is the substitution of another

risk, and determines the contract. (3 Kent Com. *313; *Coffin v. Newburyport M. I. Co.* 9 Mass. 436; Meredith's *Emerigon*, chap. 13, § 16, p. 578.) The same is true as to unnecessary delay or interruption of the specified voyage, which is, in law, a deviation. (*Audenried v. The Merc.* M. Ins. Co. 60 N. Y. 483.)

"Any unreasonable delay."—The underwriter is justified in assuming that the assured will commence and prosecute the voyage described with reasonable diligence. Should he fail to do so, the risk actually incurred becomes, by force of the delay, a different risk from that which the underwriter assumed.

But a delay resulting from necessity, or justified by circumstances, will not amount to a deviation. "To discharge the policy, there must be a clear imputation of waste of time; mere length of time elapsing between the underwriting of the policy and the sailing of the vessel is not of itself sufficient, for it is capable of explanation." (*Grant v. King*, 4 Esp. 175. See, however, *De Wolfe v. Archangel M. B. & I. Co.* Law R. 9 Q. B. 451.)

In determining, in any given case, whether the delay was reasonable or not, regard must be had to all the circumstances of the situation. A delay which is necessary or proper to avert a threatened danger, or to carry out the purposes of the voyage, is not a deviation. (*Smith v. Surridge*, 4 Esp. 25; *Bain v. Case*, 3 Car. & P. 496; *Col. Ins. Co. v. Catlett*, 12 Wheat. 383; *Phillips v. Irving*, 7 Man. & G. 328; *Schroeder v. Thompson*, 7 Taunt. 463; 1 *Phill. Ins.* § 1002.)

But a mere unexcused waste of time after the risk attaches is a deviation. (*Hamilton v. Sheddon*, 3 Mees. & W. 49; *Palmer v. Marshall*, 8 Bing. 79; *Hartley v. Buggin*, 3 Doug. 39; *Hermann v. Western F. & M. Ins. Co.* 15 La. 517; *Mount v. Larkins*, 8 Bing. 108; *Martin v. Delaware Ins. Co.* 2 Wash. C. C. 254; *Upton v. Salem Ins. Co.* 8 Met. 605; *Settle v. St. Louis P. I. Co.* 7 Mo. 379; *Arnold v. Pacific M. I. Co.* 78 N. Y. 7.) In *Phillips v. Irving*,

7 Man. & G. 325, Tindal, C. J., thus sums up the general doctrine in respect to delay in seeking a cargo in a foreign port, considered in the light of a deviation: "It may be collected from numerous cases, that delay before or after the commencement of a voyage insured is not equivalent to a deviation, unless it be unreasonable. And we think that no certain and fixed time can be said to be a reasonable or unreasonable time for seeking a cargo in a foreign port; but that the time allowed must vary with the varying circumstances which may render it more or less difficult to obtain such cargo."

What is here said in respect to the time spent in seeking a cargo in a foreign port is applicable to the subject of delay generally, considered in its relation to the question of deviation. (See *De Wolfe v. Archangel M. B. & I. Co.* Law R. 9 Q. B. 451; *Arnold v. Pacific M. Ins. Co.* 78 N. Y. 7.)

On the whole, if the delay has been, in view of all the circumstances of the case, unreasonable, or if it has been incurred for purposes not within the scope of the voyage, it will be regarded as a deviation. (See *Oliver v. Maryland Ins. Co.* 6 Cranch, 274; *Hubbard v. Coolidge*, 2 Gall. 353.)

Abandonment of voyage.—"The commencement of an entirely different voyage." An entire abandonment *ab initio* of the course of the voyage described in the policy has not usually been classed, in the law of marine insurance, under the head of deviation. In the case of a deviation from the course of the voyage agreed on, the policy protects the vessel up to the time of the deviation. (*Green v. Young*, 2 Raym. Ld. 840.) But in the case of an abandonment of the voyage *ab initio*, the policy never attaches, because the vessel is not at any time pursuing the voyage in respect to which the insurance was effected. In the latter case, the assured is entitled to a return of the premium, because the underwriter has incurred no risk; while in the case of a deviation, the

risk having been incurred, the underwriter is entitled to retain the premium. (*Tyrie v. Fletcher*, Cowp. 666; *Tait v. Levi*, 14 East, 481; 2 Arnould Ins. *1210, *1215; *Hearne v. Maine Ins. Co.* 20 Wall. 488.)

It sometimes becomes a matter of considerable difficulty to determine whether a vessel has abandoned the voyage agreed on or merely deviated from it. In the case of a vessel insured from the port of San Francisco to the port of New York, suppose she sails with the intention of proceeding to New Orleans instead of New York, and clears for the former port instead of the latter, but is lost off Cape Horn while pursuing a course which is equally direct and proper for either port, is the voyage actually undertaken a different voyage from that described in the policy? It seems that this question must be answered in the affirmative, the port of destination named in the policy having been abandoned; but if the intention on commencing the voyage had been to deviate in order to touch at New Orleans, and after leaving that port to proceed to New York, and the vessel had been lost before arriving at the dividing line, the case would have been one of intended deviation merely. (See 1 Arnould Ins. *344-348.)

In the case of the *Marine Ins. Co. v. Tucker*, 3 Cranch, 357, a vessel insured "at and from Kingston, in Jamaica, to Alexandria," took in cargo at Kingston for Baltimore and Alexandria, intending to go first to Baltimore, then to Alexandria, but was captured before she arrived at the dividing point. The Court, after an examination of numerous authorities, English and American, held that the case was one of intended deviation merely, and that the underwriters were liable.

In *Friend v. Gloucester Ins. Co.* 113 Mass. 326, a fishing vessel was insured on time, with a clause prohibiting her sailing on any voyage east of Cape Sable, after a given date. She sailed after that date for Eastport, to procure bait, and was lost before arriving there, she being at the

time fully manned and equipped for the fishing grounds east of the cape. The Court held that the term "voyage" meant the enterprise begun, and not the route taken; and that it was for the jury to determine whether she was really on a voyage to Eastport or to the fishing grounds; that if the going to Eastport was an independent voyage, not designed as a part of the fishing voyage, the plaintiff could recover; but if the fishing grounds had been fixed upon as the end of the voyage, and the stopping for bait was but an incidental part of it, the plaintiff could not recover.

The charge to the jury, which was held to be correct on appeal, was, "that if the vessel left Gloucester with the full purpose of going on a voyage east of Cape Sable, though liable to be defeated on her going to Eastport, the plaintiff could not recover; but if a voyage to Eastport was intended, subject to the contingency of its being prolonged to the fishing grounds, the plaintiffs could recover."

The doctrine generally recognized on this subject in the American cases appears to be in conformity with that which Mr. Arnould (1 Ins. *351), after an examination of the English authorities, declares to be the rule deducible from them, namely: That if the assured, either before or after the ship sails, have determined to *abandon the original port of destination*, and fixed upon another, that discharges the underwriter from all loss happening after such determination is finally formed, though such loss may occur before the ship has quitted the track of the original voyage; or even under a policy "at and from," before she has sailed from the port where the risk was to commence. (*Way v. Mondigliani*, 2 Term Rep. 30; *Tasker v. Cunningham*, 1 Bligh, 87.)

A mere intention to deviate has no effect on the policy. Some act must be done affecting the risk to constitute a deviation.

If a vessel insured on a voyage from San Francisco to New York receives cargo for Havana, with the intention

of touching at that port before proceeding to New York, and is lost while pursuing a course common to a voyage to either of these ports, the case is one of a mere intention to deviate, and the underwriter is liable until the dividing line is reached, and the vessel begins a course not within the terms of the policy; there is in such cases a mere intention to deviate, but no actual deviation. (*Foster v. Wilmer*, 2 Strange, 1249; *Thellusson v. Fergusson*, Doug. 346; *Carter v. Royal Ex. Ass. Co.* 2 Strange, 1249; *Kenley v. Ryan*, 2 Black. H. 343; *Heselton v. Allnut*, 1 Maule & S. 46; *Henshaw v. Mar. Ins. Co.* 2 Caines, 274; *Marine Ins. Co. v. Tucker*, 3 Cranch, 357; *Hobart v. Norton*, 8 Pick. 159; *Winter v. Delaware M. Ins. Co.* 30 Pa. St. 334; *Lawrence v. Ocean Ins. Co.* 11 Johns. 241; *Stocker v. Harris*, 3 Mass. 409; *Snow v. Columbian Ins. Co.* 48 N. Y. 624; *Hare v. Travis*, 7 Barn. & C. 14.)

§ 118. *A deviation is proper—*

1. *When caused by circumstances over which neither the master nor the owner of the ship has any control;*
2. *When necessary to comply with a warranty, or to avoid a peril, whether insured against or not;*
3. *When made in good faith, and upon reasonable grounds of belief in its necessity to avoid a peril; or,*
4. *When made in good faith, for the purpose of saving human life, or relieving another vessel in distress.*

Civ. Code Cal. 2695. N. Y. Civ. Code, 1471.

As to the first subsection, the term "deviation" is usually understood to imply a *voluntary* departure from the course of the voyage described in the policy. (1 Arnould Ins. *397, *398.) When compelled by moral or physical force, or reasonable necessity, it is excused. Wherever the deviation results from necessity, and is not protracted beyond the limits prescribed by such necessity, the liability of the underwriter continues. (*Robinson v. Marine Ins. Co.* 2 Johns. 89; *Turner v. Protection Ins. Co.* 25 Me. 515.)

Among cases that would fall under subsection 1 are,

mutiny on board the vessel, sickness incapacitating the crew from doing duty, arrest and detention by a belligerent power, an injury sustained compelling the vessel to seek a port of safety, a blockade of the port of destination, stress of weather, etc.

As to subsections 2 and 3: if a vessel is warranted to depart on a voyage from one port to another with convoy, it is no deviation if she sail from the port of departure to the port of rendezvous for convoy before proceeding to the port of destination. (*Gordon v. Morley*, 2 Strange, 1265.)

The peril that excuses a deviation must be real and urgent, or there must be reasonable ground for believing it to be so; and the deviation must be, or must be reasonably believed to be, necessary to avoid the peril. (*Driscoll v. Bovill*, 1 Bos. & P. N. R. 200; *Driscoll v. Passmore*, id. 221; *Blankenhagen v. London Assurance Co.* 1 Camp. 453; *O'Reilly v. Gonne*, 4 Camp. 249; *Oliver v. Maryland Ins. Co.* 7 Cranch, 493; *Whitney v. Haven*, 13 Mass. 172; *Reade v. Comm. Ins. Co.* 3 Johns. 352.) "The master, in most cases, must be the principal judge of the degree of peril to which his vessel is exposed, and of her ability to proceed in safety to a nearer or to a more distant port, and of the facilities for repairing her at different ports. If he is competent and faithful, his decision in respect to these matters, made in good faith, should be satisfactory to all interested, although he should err in judgment." (*Turner v. Protection Ins. Co.* 25 Me. 523.)

It seems that where a vessel is driven into port by stress of weather, and the master proceeds in good faith for repairs to a neighboring port, where the owner resides, the vessel will not be considered guilty of a deviation, though she might have been repaired at the first port. (*Silloway v. Neptune Ins. Co.* 12 Gray, 73.)

Whether a deviation to avoid a peril not insured against is excusable, seems an unsettled question in the law of marine insurance. (*O'Reilly v. Royal Ex. Ass. Co.* 4

Cowp. 246; *Riggin v. Patapsco Ins. Co.* 7 Har. & J. 279; *Breed v. Eaton*, 10 Mass. 21; *Robinson v. Marine Ins. Co.* 2 Johns. 89; *Scott v. Thompson*, 4 Bos. & P. 181; 2 *Parsons Mar. Law*, 300; 1 *Phillips Ins.* §§ 1023-1025; 1 *Arnould Ins.* *407.)

As to subs. 4: It seems to be the law in England, as in the United States, that a deviation to save human life on board another vessel will not avoid the policy. (3 *Kent Com.* *313, *314; *Arnould Ins.* *405; 2 *Parsons Mar. Law*, 301; *Bark Geo. Nicholaus*, Newb. Adm. 449; *Crocker v. Jackson*, *Sprague*, 141; *Scaramanga v. Stamp*, L. R. 5 C. P. D. 295.)

But the question whether a deviation to save life on board the vessel insured (unconnected with the saving of the vessel) will avoid the policy, is a question that seems to be not entirely settled. Where it becomes necessary for a vessel to put into port to obtain medicines or supplies essential to the lives of passengers, officers, or crew, because the vessel had left port without being properly provided with them, the deviation would probably be held fatal to the policy. (*Woolf v. Clagett*, 3 Esp. 257; *Kettell v. Wiggin*, 13 Mass. 68.) But where the necessity arises from circumstances for which the assured is not responsible, the deviation would, it seems, be considered excusable.

In *Perkins v. Augusta Banking Co.* 9 Gray, 317, the Court, in discussing the question of a deviation for the purpose of obtaining medical advice and assistance for the captain's wife, remarked that in such cases a deviation is justified when the master, exercising a sound judgment and acting for the best interests of all concerned, has no alternative left, as a prudent and reasonable man, but to take his vessel out of its course. This rule "neither excludes a consideration of the claims of humanity, nor fails to afford a reasonable degree of protection to the pecuniary interest of parties who have insured the safety of the ship. But if there is a conflict between the two, the former must, to the extent above stated, be regarded as of paramount

importance." (See also *Peterson v. The Chandos*, 4 Fed. Rep. 652, 653; 6 Sawy. 514.)

"Or relieving another vessel in distress." To what extent may this relief be afforded without vitiating the policy? Suppose the vessel succored is in a condition of imminent peril—for instance, grounded on a sand-bank or a reef—may the insured vessel extricate her from her dangerous position? If it be necessary as the means of saving the lives of those on board to perform services which are essentially in the nature of salvage services, may they be performed without incurring the penalty of a forfeiture of the policy?

Perhaps where the necessity is clearly established, and the delay is not prolonged beyond the period requisite to effect the saving of life, the vessel at once resuming her course after accomplishing that object, the deviation might be held excusable. But an insured vessel cannot change her course, or delay her progress, for the mere purpose of saving property, without vitiating her policy. (*The Henry Ewbank*, 1 Sum. 400; *Schooner Boston and cargo*, 1 id. 328.)

If liberty be granted by the policy "to touch" or "to touch and stay" at an intermediate port on the passage, the better opinion now is that the insured may trade there, when consistent with the object and the furtherance of the adventure, by breaking bulk, or by discharging and taking in cargo, provided it neither produces unreasonable delay, nor enhances or varies the risk. (3 Kent Com. *314; 1 Arnould Ins. *364; *Chase v. Eagle Ins. Co.* 5 Pick. 51; *Urquhardt v. Barnard*, 1 Taunt. 454; *Metcalf v. Parry*, 4 Camp. 124.)

Liberty "to stay and trade" will not be held to justify staying for salvage purposes, in the absence of evidence to warrant such a construction. (*Company of African Merchants v. British & F. M. I. Co.* Law R. 8 Ex. 154.)

In the recent case of *Burgess v. Equitable Marine Ins. Co.* 126 Mass. 70, the nature of the necessity that will jus-

tify a deviation was elaborately discussed. A vessel was insured at and from Plymouth to the Banks, cod-fishing, and at and thence back to Plymouth. It had been the practice of vessels engaged in cod-fishing to carry out only a limited supply of bait to the Banks, relying on finding there, as they usually did, a further supply. On this occasion, however, the expected supply could not be obtained at the Banks; and the vessel, having exhausted the bait on hand, went to St. Peters, more than one hundred miles distant, the nearest practicable port where bait could be procured, obtained a supply, and then returned to the Banks and resumed fishing. While thus employed, the vessel sprung a leak during a gale, and was totally lost. The underwriters refused to pay, on the ground of deviation.

In delivering the opinion of the Court, Endicott, J., remarked: "That this so-called necessity did not arise from any peril insured against in the policy, or ordinarily insured against in policies of insurance, and did not involve the safety of the vessel or of any property on board; it had relation solely to the success of the fishing adventure, and in this the defendant had no interest, and had assumed no responsibility.

"We are of opinion that the claim of the plaintiff cannot be sustained, and that a necessity to justify the departure in this case cannot be found in the fact, that, without going to St. Peters for bait, the voyage would have failed to be successful or profitable to the plaintiff." (Citing *Dodge v. Essex Ins. Co.* 12 Gray, 65; *Middlewood v. Blakes*, 7 Term Rep. 162; *Brown v. Tayleur*, 4 Ad. & E. 241; *Fernandez v. Great Western Ins. Co.* 48 N. Y. 571; *Merchants' Ins. Co. v. Algeo*, 32 Pa. St. 330.)

§ 119. *Every deviation not specified in the last section is improper.*

Civ. Code Cal. 2686. N. Y. Civ. Code, 1472.

§ 120. *An insurer is not liable for any loss happening to a thing insured subsequently to an improper deviation.*

Civ. Code Cal. 2697. N. Y. Civ. Code, 1473.

His liability ceases with the cessation of the risk against which he insured. A deviation once made from the course of the prescribed voyage, the residue of the risk is necessarily changed. (*Davis v. Garrett*, 6 Bing. 716; 1 Arnould Ins. *341.)

Waiver of deviation.—A deviation is waived by the subsequent payment of a partial loss, and giving liberty to proceed again to sea, with full knowledge of all the facts; so that the insurer cannot rely on such deviation to prevent a recovery for a subsequent total loss. (*Silloway v. Neptune Ins. Co.* 12 Gray, 73.)

As to time policies.—On a time policy restricting navigation within certain limits, a departure from such limits has been held not to vitiate the policy, if the vessel returns within them before the loss or injury occurs, and during the life of the policy, and the loss or injury is in no respect attributable to the deviation. (*Greenleaf v. Carter*, 37 Mo. 35.) But the correctness of this doctrine admits of some question. (See *Wilkins v. Tobacco F. & M. Ins. Co.* 2 Cin. Rep. 213; overruled, however, in 30 Ohio St. 317; *Odiborne v. New England M. M. Ins. Co.* 101 Mass. 551.)

ARTICLE VII.

LOSS.

- § 121. Total and partial loss.
- § 122. Partial loss.
- § 123. Actual and constructive total loss.
- § 124. Actual total loss, what.
- § 125. Constructive total loss.
- § 126. Presumed actual loss.
- § 127. Insurance on cargo, etc., when voyage is broken up.
- § 128. Cost of reshipment, etc.
- § 129. When insured is entitled to payment.
- § 130. Average loss.
- § 131. Insurance against total loss.

§ 121. *A loss may be either total or partial.*

Civ. Code Cal. 2701. N. Y. Civ. Code, 1474.

"The insurer," remarks Chancellor Kent (3 Com. *300), "undertakes only to indemnify against extraordinary perils of the sea, and not against those ordinary ones to which every ship must inevitably be exposed; but it is often difficult to discriminate between damage occasioned by the ordinary service of the voyage, and which falls upon the owner, and by a peril of the sea, for which the insurer is responsible. Damages resulting from the ordinary employment of the ship, or the inherent infirmity of the article, as the loss of an anchor by the friction of the rocks, or the wear and tear of the equipments of the ship, or her destruction by worms, or the diminution of liquids by the ordinary leakage to which they are naturally subject, or hemp taking fire in a state of effervescence, may be mentioned as instances of losses which are not within the policy, because they are not losses attributable to a *casus fortuitus*. . . . And to prevent uncertainty and dispute, it is a settled rule that the peril, whatever it may be, upon which the policy attaches, must be the proximate, and not the remote, cause of the loss." (p. *302.)

Damage resulting merely from a delay, unattended by any loss from a peril insured against, creates no claim against the underwriter. (Howard v. Astor M. Ins. Co. 5 Bosw. 38; Taylor v. Dunbar, Law R. 4 Com. P. 206; Tatham v. Hodgson, 6 Term Rep. 656.)

In Cater v. G. W. Ins. Co. Law R. 8 Com. P. 552, damage was claimed of the underwriter for consequential injury to a portion of 1711 packages of tea, the whole valued in the policy at one gross sum. It appeared that, when teas are sold by the importer, they are usually sold in the order of the consecutive numbers of the packages constituting the invoice or shipment. Where some of the packages are so damaged by salt water as to be unsaleable, so that the continuity of the successive numbers is broken, a suspicion of damage attaches to the remaining packages, which, though they may be entirely uninjured,

diminishes their market value. It was held that this description of loss to teas actually undamaged was not one for which the underwriter was responsible.

When a vessel is injured by a peril of the sea, and is obliged to put into an intermediate port for repairs, and for want of funds or credit the master is obliged to sell a portion of the cargo to pay for such expenses, such sale is not the necessary result of a peril of the sea, and the insurers are not liable therefor as such. *Dyer v. Piscataqua F. & M. Ins. Co.* 53 Me. 118; citing *Paddock v. Franklin Ins. Co.* 11 Pick. 235; *Copeland v. N. E. M. Ins. Co.* 2 Met. 437; *Gen'l M. Ins. Co. v. Sherwood*, 14 How. 351; *Powell v. Gudgeon*, 5 Maule & S. 431; *Sarquy v. Hobson*, 4 Bing. 131.

§ 122. *Every loss which is not total is partial.*

Civ. Code Cal. 2702. N. Y. Civ. Code, 1475.

§ 123. *A total loss may be either actual or constructive.*

Civ. Code Cal. 2703. N. Y. Civ. Code, 1476.

In the case of *Insurance Co. v. Gossler*, 6 Otto, 645, it was held that so long as a vessel exists in specie, a case of "utter loss," within the meaning of a bottomry bond taken on the vessel, does not arise, and she continues subject to the hypothecation created by the bond.

On the wreck of a vessel not amounting to an actual total loss, the holder of a bottomry bond on ship, freight, and cargo is entitled to the proceeds of cargo saved by his efforts as against the insurers thereof, who accepted an abandonment by the owners as for a total loss, and paid the amount of their policies, said proceeds being insufficient to satisfy the bond. (See *Thomson v. Royal Exchange Ass. Co.* 1 Maule & S. 30.)

Soin Broomfield v. Southern Ins. Co. Law R. 5 Ex. 192, where the holder of a bottomry bond on a vessel had effected insurance on his bottomry interest, it was held that he could not recover by showing a constructive total loss of the vessel, as this would not deprive him of recourse

on his bottomry bond. "The doctrine of constructive total loss," says Mr. Arnould, "is not applicable to contracts of bottomry, nor to policies effected on bottomry loans. If the ship exist in specie, though in a state which would warrant an assured on ship to abandon, as where the cost of repairs would greatly exceed her value when repaired, the assured on bottomry cannot recover; for the ship must be absolutely and totally destroyed in order to discharge the borrower; *à fortiori* capture, producing merely a temporary retardation of the voyage, and followed by restoration before action brought, will not discharge him." (2 Arnould Ins. *1115.)

The mere fact that an insured vessel exists in specie does not necessarily prevent the insured from claiming a total loss without abandonment. (McCall v. Sun Mutual Ins. Co. 66 N. Y. 515; Bullard v. Roger Williams Ins. Co. 1 Curt. 152; Roux v. Salvador, 3 Bing. N. C. 288.) "If, after encountering a sea peril from which it sustained injury, it is for that reason justifiably sold by the master, the loss then, as between the insured and insurer, becomes a total one. The title is by such a sale irrevocably gone from the owner, and cannot by abandonment be transferred to the insurer. The insured may, under such circumstances, claim a total loss, accounting to the insured for the proceeds of the sale, as salvage received for his benefit. (Idle v. Royal Ex. Ins. Co. 7 Taunt. 755; Cambridge v. Atherton, 1 Russ. & M. 60; 2 Barn. & C. 91; Roux v. Salvador, 2 Bing. N. C. 288; Dyson v. Rowcroft, 3 Bos. & P. 474; Gordon v. Mass. F. & M. Ins. Co. 2 Pick. 249; Am. Ins. Co. v. Center, 4 Wend. 53; 2 Parsons Mar. Ins. 86; Arnould Ins. *850; 2 Phillips Ins. § 1497; Saunders v. Baring, 34 L. T. 419, Q. B. D.) The sale, when justifiably made, is not the cause of the loss, but the sea peril which made the sale necessary. (McCall v. Sun M. Ins. Co. 66 N. Y. 506, 516.)

In this case, the vessel having been driven on the rocks at Cow Bay, Cape Breton, bilged and filled with water;

her mainmast and foremast were carried away, and the whole ship was badly strained and logged. Her situation was in the highest degree perilous. A survey was held by competent surveyors, who pronounced the vessel a complete wreck, and she was thereupon fairly sold at auction by the master, who did not then know she was insured. No abandonment was made. The underwriters were held liable for a total loss. (See *Graves v. Washington Marine Ins. Co.* 12 Allen, 391.)

In the recent case of *Cobequid Ins. Co. v. Marteaux*, Law R. 6 P. C. 319, it was held that a master has no power to sell the vessel so as to affect the insurers, except under circumstances of stringent necessity; such circumstances as, after sufficient examination of his condition, after every exertion of his power with the means at his disposal to extricate her from the peril, or raise funds for the repairs, leave him no alternative but to sell her as she is.

If a partial loss is repaired by the insured, and the vessel is afterwards totally lost during the term of the policy, the insurer is liable for the amount of both losses, although exceeding the sum named in the policy. (*Matheson v. Eq. Ins. Co.* 118 Mass. 209, citing and reviewing numerous authorities.)

§ 124. *An actual total loss is caused by—*

1. *A total destruction of the thing insured;*
2. *The loss of the thing by sinking, or by being broken up;*
3. *Any damage to the thing which renders it valueless to the owner for the purposes for which he held it; or,*
4. *Any other event which entirely deprives the owner of the possession, at the port of destination, of the thing insured.*

Civ. Code Cal. 2704. N. Y. Civ. Code, 1477.

The mere submersion of a ship or cargo is not necessarily a total loss, for in many cases of this kind the property can be readily recovered, and is not in any just

sense lost to the owner. If the submersion be such as to preclude any reasonable hope of the restoration of the property to the owner, the loss is total. (*Sewall v. U. S. Ins. Co.* 11 Pick. 90; *Peele v. Suffolk Ins. Co.* 7 id. 257.)

Subsection 3. As where a ship is wrecked, and though preserving the form and appearance of a ship, is a mere congeries of planks, of no use for the purpose of navigation. (*Cambridge v. Anderton*, *Ryan & M.* 60; 4 Dowl. & R. 203; *Allen v. Sugrue*, *Dan. & Ll.* 192.)

Subsection 4. Such as hostile capture, belligerent seizure and confiscation, sea damage to cargo, destroying it in specie before arrival at the place of destination. (*Andrews v. Mellish*, 15 East, 13; *Mullett v. Shedden*, 13 id. 304; *Williams v. Cole*, 16 Me. 207.)

§ 125. *A constructive total loss is one which gives to a person insured a right to abandon, under § 134.*

Civ. Code Cal. 2705. *N. Y. Civ. Code*, 1478.

The assured, though he may decline the exercise of this right, is entitled to indemnity under his policy for any loss or damage from the perils insured against. In *Graves v. Washington Marine Ins. Co.* 12 Allen, 391, it was held that if a vessel insured by a valued policy becomes innavigable by reason of perils of the sea while on her voyage, and requires repairs which will cost more than her valuation, and is therefore condemned and sold in a port of necessity, without any repairs being made, and without an abandonment, the owner may recover the full sum insured, deducting the proceeds of the sale, if the amount so found does not exceed his net loss; and it is not necessary in such case to inquire into her diminished value at the home port.

§ 126. *An actual loss may be presumed from the continued absence of a ship without being heard of; and the length of time which is sufficient to raise this presumption depends on the circumstances of the case.*

Civ. Code Cal. 2706. *N. Y. Civ. Code*, 1479. See *Code de Commerce*, arts. 375-377.

§ 127. *When a ship is prevented at an intermediate port from completing the voyage by the perils insured against, the master must make every exertion to procure, in the same or a contiguous port, another ship for the purpose of conveying the cargo to its destination; and the liability of a marine insurer thereon continues after they are thus reshipped.*

Civ. Code Cal. 2707. N. Y. Civ. Code, 1480.

The continuing liability of the insurer on cargo after a justifiable transshipment, though a familiar principle of the maritime law of continental Europe (Meredith's *Emerigon*, ch. 12, § 16, p. 340; *Code de Commerce*, §§ 392, 393) was not distinctly recognized in England until the case of *Plantamour v. Staples*, 3 Doug. 1, decided in 1782. (See also *Shipton v. Thornton*, 9 Ad. & E. 314.)

It is now a settled principle of the law of marine insurance both in England and the United States. (See *Pierce v. Columbian Ins. Co.* 14 Allen, 322.)

In the case of the *Soblomsten*, L. R. 1 Ad. & E., the Court thus declared the law in respect to the duty of a master who has been obliged to put into an intermediate port in distress:

1st. On the vessel being disabled at an intermediate port, the master is allowed a reasonable time within which to reship or transship so as to earn his freight.

2nd. That the whole freight is payable if, by default of the owner of cargo, the master is prevented from forwarding the cargo from the intermediate port to the port of destination.

3rd. That no freight is payable if the owner of cargo, against his will, is compelled to take the cargo at an intermediate port.

4th. That to justify a claim for *pro rata* freight, there must be a voluntary acceptance of the goods by their owner at an intermediate port in such a manner as to raise a fair inference that the further carriage of the goods was intentionally dispensed with.

These propositions appear to be in conformity with the

law of continental Europe, and with the decisions of the American Courts. (2 Pouget Droit Mar. 372; Valin, Commentary on the Ordonnance, Book 3, Title 3, sec. 11; Code de Commerce, art. 296; 3 Kent Com. *229, *230; Clark v. Mass. F. & M. Ins. Co. 2 Pick. 104; McGaw v. Ocean Ins. Co. 23 id. 405; Griswold v. N. Y. Ins. Co. 3 Johns. 321; Jordan v. Warren Ins. Co. 1 Story, 342; Welch v. Hicks, 6 Cowen, 504; Ship Nathaniel Hooper, 3 Sum. 542; Atlantic M. I. Co. v. Bird, 2 Bosw. 205.)

The American decisions maintain that it is not only the right but the duty of the master, in case of the loss of his own ship, to forward the goods to their destination in another vessel. (Saltus v. Ocean Ins. Co. 12 Johns. 107; Schieffelin v. N. Y. Ins. Co. 9 id. 21; Searle v. Scovell, 4 Johns. Ch. 218; Bryant v. Commonwealth Ins. Co. 6 Pick. 130; Hugg v. Augusta Ins. Co. 7 How. 595, 609.) This point seems to be left in doubt by the English decisions (Shipton v. Thornton, 9 Ad. & E. 314; Kidston v. Empire Ins. Co. Law R. 1 Com. P. 535; 2 id. 357; Farnworth v. Hyde, Law R. 2 Com. P. 204, 206); and the continental authorities seem in conflict respecting it. (3 Kent Com. *211; 2 Pouget Droit Mar. 372.)

But the master is not bound in all cases to transship the cargo in the event of his inability to complete the voyage in his own vessel. The goods may be in such a condition of decay and decomposition as to render it necessary to sell them without delay for the benefit of all concerned. (American Ins. Co. v. Center, 4 Wend. 45; Bryant v. Commonwealth Ins. Co. 6 Pick. 131; The Ship Packet, 3 Mason, 255; Jordan v. Warren Ins. Co. 1 Story, 342; 3 Kent Com. *212.) He can only sell ship or cargo in a case of necessity, and must, before selling, communicate, if practicable, with the owner; otherwise the sale will be considered as unauthorized. (Underwood v. Robertson, 4 Camp. 138; Freeman v. East India Co. 5 Barn. & Ald. 617; Cannon v. Meaburn, 1 Bing. 243; Currie v. Bombay Native Ins. Co. Law R. 3 Com. P. 72; Pope v. Nickerson,

3 Story, 465; *Bryant v. Com. Ins. Co.* 13 Pick. 543, 552-555; *Pike v. Balch*, 38 Me. 302; *Gates v. Thompson*, 57 id. 442; *Miller v. Thompson*, 60 id. 322; *The Joshua Barker*, Abb. Adm. 215; 2 Phill. Ins. § 1578.) And the telegraph must be resorted to, if its use seems reasonably expedient. (*Australasian Ins. Co. v. Morse*, Law R. 4 P. C. 222. See also *Acatos v. Burns*, L. R. 3 Ex. D. 282.)

If perishable cargo be damaged so that its transportation to the port of delivery will result in its still further deterioration, the master, it seems, will not be justified in carrying it on in its damaged state from the intermediate port, in order to earn freight, if without unreasonable expense and delay it might be put in such a condition as to enable it to be transported to its destination without additional loss from this cause. (*Notara v. Henderson*, Law R. 5 Q. B. 346; 7 id. 225.)

But if this cannot be accomplished, and the goods are in a state of decomposition or decay, so that their farther transportation would imperil the lives or the health of those on board, or the safety of the ship, or of the residue of the cargo, the master is justified in refusing to transport them farther; and must, if practicable, sell them. (See cases *infra*)

If the ship is lost, actually or constructively, at the intermediate port, and no other vessel can be obtained in a reasonable time to forward the cargo to its destination for a sum less than the original amount of freight, there is a total loss of freight. The agency of the master as the representative of the ship-owner is then, it seems, at an end, and he becomes, by the exigency of the case, the agent of the owner of the cargo, and must discharge the duties—whatever they may be under the circumstances—which devolve upon him in that capacity. (*Thwing v. Washington Ins. Co.* 10 Gray, 443; *Lemont v. Lord*, 52 Me. 365. See *Atwood v. Sellar*, Law R. 4 Q. B. D. 356, 357.)

Pro rata freight.—Some of the earlier decisions on the question of *pro rata* freight maintained the

doctrine that such freight was due in all cases where the goods or their proceeds had come to the hands of the shipper at an intermediate port, although the master had made no offer to complete his contract by carrying or forwarding the goods to their destination. (See *Luke v. Lyde*, 2 Burr. 888.) But the current of modern authority has tended steadily in another direction; and it is now the well-settled law on this subject that, in order to justify a claim for *pro rata* freight, there must be a readiness and willingness on the part of the master to complete the transportation of the goods to their destination, and a voluntary acceptance of them or their proceeds at the intermediate port in such a mode as to raise a fair inference that their further carriage was intentionally dispensed with. (*Vlierbloom v. Chapman*, 13 Mees. & W. 238; *Metcalf v. Britannia Ironworks Co.* Law R. 1 Q. B. D. 613; *The Soblomsten*, Law R. 1 Ad. & Eq. 297; *Hill v. Wilson*, L. R. 4 C. P. D. 335; *Hopper v. Burness*, L. R. 1 C. P. D. 140, 142; *Acatos v. Burns*, L. R. 3 Ex. D. 282; *The Mohawk*, 8 Wall. 161; *Hurtin v. Union Ins. Co.* 1 Wash. C. C. 530; *Armroyd v. Union Ins. Co.* 3 Binn. 437; *Callender v. Ins. Co. of North America*, 6 id. 525; *Case v. Baltimore Ins. Co.* 7 Cranch, 358; *Welch v. Hicks*, 6 Cowen, 504; *Gray v. Waln*, 2 Serg. & R. 229. See also Mr. Justice Story's learned note to *Abbott on Shipping*, 6th Am. Ed. 455, note; and the learned and elaborate note on the subject of *pro rata* freight in *American Leading Cases*, 2nd ed. vol. 2, p. 647.)

The complete delivery of the entire shipment at the port of destination being the condition on which, in most cases, the right to freight depends, it is obvious that in such cases the carrier cannot recover freight under his contract with the shipper without full performance of this condition. The principle on which the right to recover *pro rata* freight depends is, that although the original contract has not been performed, the owner or consignee of the goods has accepted them under such

circumstances as to create an implied assumpsit on his part to pay so much freight as the master was fairly entitled to receive. (*Armroyd v. Union Ins. Co.* 3 Binn. 437; *Gray v. Waln*, 2 Serg. & R. 229; *Vlierbloom v. Chapman*, 13 Mees. & W. 230; 3 Kent Com. *229, and cases cited; *Abbott on Shipping*, 329, and note.)

Different modes have been adopted for ascertaining the ratable amount of freight due at the intermediate port. (See *Luke v. Lyde*, 2 Burr. 882; *Robinson v. Marine Ins. Co.* 2 Johns. 323.) Perhaps the rule adopted in *Coffin v. Storer*, 5 Mass. 252, is least open to objection. It is, to allow the ship-owner the freight agreed on, deducting therefrom the expense of forwarding the goods from the intermediate port to their ultimate destination.

In the case of *Hugg v. Augusta Insurance and Banking Company*, 7 How. 595, 608, a quantity of dried beef was taken on board at Montevideo for delivery at Matanzas or Havana. Some of it was jettisoned on the voyage, and the residue was found to be very much damaged by salt water; and on the arrival of the vessel at Nassau in distress, the authorities of the place permitted only a portion of it to be landed; the rest was thrown into the sea by their order. The vessel having been necessarily detained at Nassau, and the remainder of the beef being in a state of rapid deterioration, it was judged advisable to sell it.

The Court, in discussing the duties of the master in respect to cargo when the voyage is interrupted at an intermediate port, remarked as follows:

"The interest of the owner of the cargo may frequently be adverse to that of the owner of the ship; for although the goods remain in specie, and in that condition capable of being carried on, it may be for the interest of the owner, or of the insurer of the cargo, to have it sold in its then damaged state at the intermediate port, instead of taking the risk of further deterioration. But in that case, the owner, or those representing him, must act

upon their own responsibility; for if he elects to receive the goods voluntarily at a place short of the port of destination, he is responsible for the freight. The loss cannot be total or partial at his will, or as his interest may dictate.

"It was said in *Griswold v. New York Ins. Co.* (which was an action on a policy on freight), that whether it would have been wise or foolish in the shipper to have sent on the flour in the condition it was in, was a question not to be put to the plaintiffs. It was none of their concern. The risk of the value of the cargo at the port of delivery lay with the owners of the cargo. All that the plaintiffs had to do by their contract was to provide the means to take on the cargo, by repairing their ship or procuring another.

"Other considerations may arise as between the owner and the insurer of the cargo, but it is not important now to go into them.

"On looking into the facts in this case, it will be seen that the portion of the beef landed at Nassau, and sold, was wet and heated; and that the board of health had recommended to the authorities that it should be removed as soon as it conveniently could be without too great a sacrifice of the property. It is obvious, therefore, that the perishable condition of the article must be taken into consideration in deciding upon the obligation of the master, in the emergency, to repair his vessel or to procure another for the purpose of sending it on to the port of delivery. If it should be made to appear that the repairs or procurement of another vessel would necessarily produce such a retardation of the voyage as would, in all probability, occasion a destruction of the article in specie before it could arrive at the port of destination, or that from its damaged condition it could not be reshipped in time consistently with the health of the crew or safety of the vessel, or would not be in a fit condition, from pestilential effluvia or otherwise, to be carried on, it then was

the duty of the master to sell the goods for the benefit of whom it might concern.

"The cargo being in a perishable condition, the extent of the repairs, or difficulty of procuring another vessel, and consequent delay attending the same, are material considerations influencing his judgment in deciding upon the necessity of a sale; for it would be unreasonable to require him to subject his owner to this expense, when at the same time a strong probability existed that the cargo would not be in a condition to be reshipped. (18 Johns. 208; 6 Cowen, 270; 1 Bing. N. C. 526; 3 id. 266; 3 Brod. & B. 97; 6 Moore, 288; 6 Taunt. 383; 1 Holt, 48; 3 Kent Com. *212, *213; 2 Phillips, 331, *et seq.*)

"The quantity and value of the portion saved are also material circumstances to be considered in exercising a sound discretion in respect to the extent of the repairs required to be made, or of expense in the procurement of another vessel, with a view to the earning of salvage for the benefit of the underwriter on freight. The owner of the cargo is liable for any increased freight arising from the hire of another vessel; and unless it can be procured at an expense not exceeding the amount of the freight to be earned by completing the voyage, the underwriter on freight has no right to insist on this duty of the master. Beyond this, it becomes a question between him and the owner or underwriter of the cargo. (3 Kent Com. *212; *Shipton v. Thornton*, 9 Ad. & E. 314; *Searle v. Scovell*, 4 Johns. Ch. R. 218; *Am. Ins. Co. v. Center*, 4 Wend. 45; 2 Phillips, 216.)"

§ 128. *In addition to the liability mentioned in the last section, a marine insurer is bound for damages, expenses of discharging, storage, reshipment, extra freightage, and all other expenses incurred in saving cargo reshipped pursuant to the last section, up to the amount insured.*

Civ. Code Cal. 2708. N. Y. Civ. Code, 1481.

"A marine insurer is bound," etc. But is the insurer

on freight or on cargo bound to pay these expenses? Chancellor Kent (3 Com. *338) states that "the French rule is to charge the extraordinary expense and extra freight incurred by transshipment upon the insurer of the cargo. This question is left undecided in the English law; but in this country we have followed the French rule. (*Mumford v. Com. Ins. Co.* 5 Johns. 262; *Searle v. Scovell*, 4 Johns. Ch. 218; *Dodge v. Marine Ins. Co.* 17 Mass. 471.)" See *Ogden v. Gen. M. I. Co.* 2 Duer, 216.

Mr. Arnould (Ins. vol. 2, *963), adopting the views of Benecke (Phillips' Stevens & Benecke, 363, 364), suggests that if the goods were transshipped *for the sole purpose of earning freight*, these expenses should be borne by the underwriter on freight. (See *Kidston v. Empire Ins. Co.* Law R. 1 Com. P. 535; 2 id. 357; *McLoon v. Cumming*, 73 Pa. St. 98.)

Mr. Phillips (2 Ins. § 632) states that if the ship is rendered innavigable, and cannot be repaired for the prosecution of the voyage, and another can be procured within a reasonable time and distance, and the master has means to procure such other at an expense materially less than the amount of the original freight for the voyage, the underwriter on freight or profits is not liable to be prejudiced by the master's neglect to transship, any more than the underwriter upon the cargo; and the loss will be adjusted as if the cargo had been transshipped and forwarded, and will be partial or total according to the amount of the loss.

In *Hubbell v. Great Western Ins. Co.* 74 N. Y. 255, Rapallo, J., referring to this passage, remarks, "that the expense here referred to is simply that of completing the transportation; and that where, by perils of the sea, the goods are placed in a situation of danger, extra expenses necessarily incurred for saving or taking care of them are not chargeable against the ship-owner or the freight, but against the cargo; and although such expenses, when added to the cost of transportation, may exceed the amount

of the freight for the whole voyage, they do not prevent the earning of freight, provided the selling price of the goods at the port of destination would be sufficient to cover all the expenses."

In *Rosetto v. Gurney*, 11 Com. B. N. S. 176, on a question as to whether a constructive total loss of cargo had occurred through disasters and consequent expenses at intermediate ports, it was held that the proper inquiry was: "Was it practicable to send the whole or any portion of the cargo to its place of destination in a merchantable state. To determine this question, the jury must ascertain the cost of unshipping the cargo, the cost of drying and warehousing it, the cost of transshipping it into a new bottom, and the cost of the difference of transit, if it can only be effected at a higher than the original rate of freight. Add to these items the salvage allowed in proportion to the value of the cargo saved, and the loss will be total if the aggregate exceed the value of the cargo when delivered at the port of discharge. But if the aggregate do not exceed the value of the cargo, or of that part of it saved, the loss will be partial only." (See *Kemp v. Halliday*, 6 Best & Smith, 752; Opinion of Blackburn, J.)

The rule here prescribed as the test of a constructive total loss on cargo does not appear to have been incorporated into the American law of marine insurance. (2 Parsons Mar. Law, 385.) Its adoption would seem to make the constructive totality of the loss dependent in a measure on the fluctuations of the market at the port of destination. An adventure may prove so unfortunate from other causes than sea perils that the cargo will not pay the expenses of its transportation and delivery.

It was held in *De Cuadra v. Swann*, 16 Com. B. N. S. 772, that where a ship is so much damaged by perils of the sea that she cannot be repaired so as to prosecute her voyage except at an expense exceeding her value when repaired, together with the freight, the master is justified in abandoning the voyage, and is not bound, as agent of the owner, to send the goods on in another vessel.

In such case, if the voyage is abandoned, and the ship-owner employs other vessels to carry on the goods at a rate of freight exceeding the original freight, there is a total loss of freight.

Where the original vessel is disabled, and a substituted vessel transports the cargo to its destination, the original owners are entitled to the freight thus earned, and not the abandonees of the ship, unless these latter can show that the master hired the substituted ship on their account. (*Hickie v. Rodocanachi*, 4 Hurl. & N. 455.)

Where a substituted vessel is employed to forward the cargo to its destination, the owner of the cargo cannot be charged with both the original freight and that payable to the substituted vessel, but only with the excess of the cost of transshipment and the original freight. (*Searle v. Scovell*, 4 Johns. Ch. 218; *Am. Ins. Co. v. Center*, 4 Wend. 45; *Shipton v. Thornton*, 9 Ad. & E. 314; *Hugg v. Baltimore Smelting Co.* 35 Md. 414.)

§ 129. *Upon an actual total loss, a person insured is entitled to payment without notice of abandonment.*

Civ. Code Cal. 2709. N. Y. Civ. Code, 1482.

In such case, there is supposed to be nothing left of the insured property to abandon.

§ 130. *Where it has been agreed that an insurance upon a particular thing or class of things shall be free from particular average, a marine insurer is not liable for any particular average loss not depriving the insured of the possession, at the port of destination, of the whole of such thing or class of things, even though it become entirely worthless; but he is liable for his proportion of all general average loss assessed upon the thing insured.*

Civ. Code Cal. 2711. N. Y. Civ. Code, 1483.

It has long been the practice to introduce into policies of marine insurance a stipulation that, in respect to certain enumerated articles belonging to that class of commodities which is most subject to damage and de-

terioration from inherent decay, the underwriter shall not be liable for any amount of sea damage short of a total loss; as to other enumerated articles of a less perishable nature, that the underwriter shall only be liable in case the damage amounts to a certain stipulated percentage.

The usual form of this stipulation (known as the memorandum clause) in English policies is as follows:

1. Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded.

2. Sugar, tobacco, hemp, flax, hides, and skins are warranted free from average under five per cent., unless general, or the ship be stranded.

3. And all other goods, also the ship and freight, are warranted free of average under three per cent., unless general, or the ship be stranded.

Goods warranted "free from average unless general" are, in the language of § 130, "free from particular average"; and the insurer of such goods is exempted from liability for any partial loss. (*Cocking v. Fraser*, Park. Ins. 151; 2 Arnould Ins. *852-*854; 3 Kent Com. *295, *296; *Maggrath v. Church*, 1 Caines, 196; *Salters v. Ocean Ins. Co.* 14 Johns. 138; *Marcardier v. Chesapeake Ins. Co.* 8 Cranch, 39; *Morean v. U. S. Ins. Co.* 1 Wheat. 219.) But for contribution to general average losses, he is in all cases liable. (*Wilson v. Smith*, 3 Burr. 1550; 2 Phill. Ins. §§ 1757, 1763.)

The term "particular average" is sometimes used as synonymous with partial loss, and sometimes in contradistinction to the term "general average," as indicating that the loss must be wholly borne by the party on whom it falls, instead of being, like a general average loss, made good by a contribution from the parties who have derived benefit therefrom. The term "average losses" indicates losses partial in their nature, and not liable to be made good by contribution. (2 Arnould Ins. *955.)

By article 408 of the Code de Commerce, the insurer is

not liable for a general average loss, unless it exceeds one per cent. of the sum of the value of the ship and cargo; nor for particular average, unless it exceeds one per cent. of the value of the thing which has sustained the damage.

By article 409 of the same Code, the clause "free from average" discharges the underwriters from all losses, whether from particular or general average, except those which authorize an abandonment; and in respect to these, the assured may elect either to abandon or to claim the amount of the loss.

An interesting essay on the origin and history of the term "average" will be found in the note of Mr. McLachlan, in his edition of Arnould's Insurance, vol. 2, p. 819. See also on this subject Lowndes Gen. Av. p. 270, where the writer questions the correctness of the views of Mr. McLachlan. By comparing § 124, subsection 4, with § 130, it will be seen that the latter provides, in substance, that an insurance free from particular average is an insurance against total loss only. The expression "an actual total loss" has the same meaning when applied to memorandum articles as to any other subject of insurance. (*Roux v. Salvador*, 3 Bing. N. C. 277, 278; *Morean v. U. S. Ins. Co.* 1 Wheat. 219.)

The underwriter, therefore, is not liable for any partial loss on goods "free from particular average," or "free from average unless general." There must, in order to render him liable, be a total loss of the property, or a loss for which, under a general average contribution, the property insured is liable to pay its proportionate share; or in the words of the memorandum, the ship must "be stranded." (*Wilson v. Smith*, 3 Burr. 1550.)

The phrase "free from average unless general, or *the ship be stranded*," is said to have been introduced into the English policies about the year 1749. (3 Kent Com. *294.) The latter clause of the phrase is omitted in most of the American policies. The object of the introduction of this

stipulation into the policy seems to have been the protection of the underwriter on perishable articles against partial losses, the precise cause of which, whether sea damage or intrinsic decay, it was difficult to ascertain, except in cases where the loss was evidently caused by the stranding or wreck of the ship, in which event the underwriter was willing to be held liable. He intended, as to the enumerated articles, to exonerate himself by means of the memorandum clause from all partial losses, except those which were *attributable to the stranding of the vessel*, or a general average sacrifice. But the stipulation has received a judicial construction at variance with this signification; and it is held in the English Courts that if the ship be in fact stranded while the specified articles are on board and covered by the policy, the underwriter is liable to pay partial losses on them, caused by sea damage, whether produced by the stranding or not. (*Cantillon v. London Ass. Co.* cited 3 Burr. 1553; *Bowring v. Elmslie*, 7 Term Rep. 216, n; *Burnett v. Kensington*, id. 210.)

Numerous decisions, chiefly in the English Courts, are reported in respect to the meaning of the term "stranded." A vessel is stranded when in an unusual and dangerous manner she comes in contact with and rests on the strand, the ground, a rock, or an artificial obstruction, so that unless removed from this position she may be regarded as wrecked. (See cases 2 Parsons Mar. Law, 268, 269; *Phillips Ins.* § 1758; 2 Arnould Ins. *860-*864; *Litchford v. Oldham*, L. R. 5 Q. B. D. 538.)

Mr. Phillips (2 Ins. § 1761) states that the forms of policies in common use in New York, and the ports south of that place, contain no provision on the subject of stranding. By the common form of policies used in Boston and many of the other ports to the north of New York, the insurers are liable for particular average on the memorandum articles, in case of stranding; but the policy expressly limits their liability to the losses *occasioned by the stranding*.

It is held by the English Courts that if articles insured free from average unless general, or free from particular average, arrive in specie at the port of destination, though so damaged by sea perils as to be worthless, the underwriter is not liable, because there is in such case no total loss. In McLachlan's edition of Arnould's Insurance (1872), vol. 2, p. 900, this is stated as the result of the English authorities, among which are cited *Roux v. Salvador*, 3 Bing. N. C. 266, 278; *McAndrews v. Vaughan*, 1 Park. Ins. 252; *Mason v. Skurray*, id. 253; *Glennie v. London Ass. Co.* 2 Maule & S. 371, 376.

The same doctrine appears to be generally held in the United States. Chancellor Kent (3 Com. *296) remarks, that "in our American Courts the doctrine of *Cocking v. Fraser* is the received law." In this case, the vessel, with a cargo of fish, bound to Figueira in Portugal, was forced to put into Lisbon in distress. Part of the fish had been thrown overboard on the voyage; the remainder were examined in port by the board of health, and were pronounced to be, and were in fact, of no value. The vessel, therefore, did not proceed to Figueira, and no part of the cargo was forwarded thither. The owner of the cargo sued the underwriter, who was only liable for a total loss. "What," said Lord Mansfield, "is a total loss? A total loss of the thing insured is the absolute destruction of it by the wreck of the ship. The fish may all come to port, though from the nature of the commodity it may be putrid, it may be stinking, still *as the commodity specifically remains*, the underwriter is discharged."

In the case of *Cocking v. Fraser* there was no stranding. Though the cargo was injured by perils of the sea, there is nothing in the report of the case to show that it might not have been transported so as to arrive in specie at Figueira, its port of destination. According to Mr. Marshall's statement of the case, the cargo was not transported to its destination because it was of no value. (Marshall Ins. 145, 1st. Am. ed.)

All, therefore, that is actually decided in *Cocking v. Fraser* is that, in a case free from stranding, memorandum articles which are rendered of no value by reason of perils of the sea, and for that reason are not transported to their destination, though it is not shown that they might not have been carried there so as to arrive in specie, are not totally lost, and the insurer is therefore not liable.

Burnett v. Kensington, 7 Term Rep. 210, in which *Cocking v. Fraser* is questioned, is a case where there was a stranding, and the question in dispute was whether it was necessary for the assured to prove that the damage was caused by reason of such stranding, in order to recover for a partial loss on memorandum articles. The Court held that it was not.

Dyson v. Rowcroft, 3 Bos. & P. 474, was a case of a different character from either of the two last-mentioned cases. The policy was on fruit, from Cadiz to London. The vessel was forced by stress of weather to put into Palma, and afterwards into Santa Cruz. At the latter port the cargo was in so advanced a state of putridity that the authorities prohibited its landing, and it was therefore thrown overboard. The ship was found to be so much damaged in the course of the voyage as to be unable to complete it, and she was therefore necessarily sold.

The loss on cargo was held to be total, on the ground that it was necessarily thrown overboard, and the voyage thereby broken up. Lord Alvanley, C. J., in delivering his opinion, says: "The case of *Cocking v. Fraser* was the only thing which raised any doubt in my mind, and it is certainly a very strong case." But so far as the facts of the case are reported, *Cocking v. Fraser* presents a totally different question from that raised in *Dyson v. Rowcroft*.

In the latter case, the cargo could not have reached its destination in specie, because, first, it was necessary to remove it in order to repair the vessel, and the only mode

in which its removal was permitted was by throwing it overboard; and in the second place, as it could not have remained on board without endangering the life and health of the crew, it was practically impossible to transport it any farther. The Lord Chief Justice remarks, in conclusion: "I must now take it that the circumstances under which the cargo in this case stood were such that sea damage had so operated as to make it impossible for the captain to keep it any longer on board."

In *Cologan v. London Assurance Company*, 5 Maule & S. 447, Lord Ellenborough expressed his inclination to the opinion of Lord Alvanley in *Dyson v. Rowcroft*, in preference to that of Lord Mansfield in *Cocking v. Fraser*. But the case of *Cologan v. London Assurance Company* was decided on the ground that a total loss had occurred by capture. The question of a total loss of part of a memorandum article, which, in consequence of sea damage, was thrown overboard at an intermediate port, was discussed by counsel, but not passed upon by the Court. More recent decisions, both English and American, have held, that if the insured cargo, through perils of the sea, has undergone such a change that it is not merely worthless, but from its putridity so dangerous to life and health that no ship would undertake to transport it to its destination, so that the voyage is necessarily broken up—not because the property is not worth carrying to its destination, but because its transportation thither becomes practically impossible—there is in such case a total loss. (*Roux v. Salvador*, 3 Bing. N. C. 266; *Poole v. Protection Ins. Co.* 14 Conn. 47; *Delaware Ins. Co. v. Winter*, 38 Pa. St. 176; *Hugg v. Augusta Ins. Co.* 7 How. 595; *Tudor v. New England Ins. Co.* 12 Cush. 554; *De Peyster v. Sun Mutual Ins. Co.* 19 N. Y. 272; *Wallerstein v. Columbian Ins. Co.* 44 id. 204; *Williams v. Cole*, 16 Me. 207; *Williams v. Kennebec Mutual Ins. Co.* 31 id. 455; *Hugg v. Augusta Ins. Co.* 7 How. 604; *Silloway v. Neptune Ins. Co.* 12 Gray, 73.)

It is still, however, the law, both in England and the United States, that if memorandum articles, insured "free from average unless general," arrive at their port of destination in specie, however reduced in value or quantity, there is no total loss, and the underwriter is not liable. (*Roux v. Salvador*, 3 Bing. N. C. 278; *McAndrews v. Vaughan*, 1 Park. Ins. 252; *Mason v. Skurray*, id. 253; *Glennie v. London Ass. Co.* 2 Maule & S. 371; *Neilson v. Columbian Ins. Co.* 3 Caines, 108; *Maggrath v. Church*, 1 id. 196; *Morean v. United States Ins. Co.* 1 Wheat. 219; 3 Kent Com. *296.)

What is a destruction in specie? In the case of *Insurance Co. v. Fogarty*, 19 Wall. 640, a complete sugar-packing machine, described in the bill of lading as eight pieces and eight boxes, containing one sugar packer and three trucks, was insured free from average unless general, on a voyage from New York to Havana. The ship encountered a severe gale near Havana, filled with water, became a total wreck, and was abandoned to the underwriters. The underwriters' agent at Havana took possession, and recovered some portions of the cargo; among others, a large number of pieces of the machinery referred to. These were tendered to plaintiff at Havana, but he refused to receive them, insisting that the loss was total.

The testimony showed that the machinery in question was all iron. About half in weight was saved, the remainder was at the bottom of the sea. That which was saved would sell, as old iron, for about \$50, but was valueless as machinery. The machinery, in working order, was worth \$2,250. It would cost more to repair and put in order what was saved than to buy a new machine.

The Supreme Court, after citing and reviewing *Biays v. Chesapeake Ins. Co.* 7 Cranch, 415; *Marcardier v. Chesapeake Ins. Co.* 8 id. 415; *Morean v. U. S. Ins. Co.* 1 Wheat. 219; *Hugg v. Augusta Ins. Co.* 7 How. 595; *Ta-*

ney, 168; *Judah v. Randal*, 2 Caines Cas. 324; and *Wallerstein v. The Columbian Ins. Co.* 44 N. Y. 204—pronounced its opinion as follows: "The Circuit Court was right in holding that what was insured was machinery—pieces or parts of a machine—pieces made and shaped to unite at points with other pieces so as to make a sugar-packing machine. If parts of them were absolutely lost, and every piece recovered had lost its adaptability to be used as a part of the machine—had lost it so entirely that it would cost as much to buy a new piece just like it as to repair or adapt that one to the purpose—then there was a total loss of the machinery. If no piece recovered was of any use, or could be applied to any use connected with the machine of which it was a part without more expense on it than its original cost, then there was no part of the *machinery* saved—however much of rusty iron may have been taken from the wreck. The Court went quite as far in behalf of the defendant as the law justified, when it told the jury that the plaintiff could not recover if any piece or portion of the machinery insured arrived at its destination in a condition so perfect that it could have been used with its corresponding or connecting pieces had they also arrived in good condition.

So in *Judah v. Randal*, 2 Caines Cas. 324, cited in the above case, a chariot was insured against total loss. On the voyage the box of the chariot was jettisoned. Verdict for plaintiff for total loss, subject to the opinion of the Court. Held, that the loss of the box destroyed the identity of the chariot. "If a wheel or any other part of the *carriage part* should be lost, or be so injured as to be wholly unserviceable, and therefore a new part became necessary in the place of the part so lost or injured, the chariot would be said to be *repaired* only; but if the box should be lost, or be so injured, it could not with propriety be said that the chariot was repaired by a new box. It would be considered as a new chariot, but that

the old *carriage part* was made to serve." The Court compared the case to that of a vessel. If a new hull were built to replace that which was lost, and the old spars, sails, and rigging adapted to it, the identity of the vessel would not thereby be restored.

Abandonment as to memorandum articles.—

Where, by the operation of a peril insured against, the cargo is placed in such a condition as to create a constructive total loss, and is accordingly abandoned to the underwriters, memorandum articles stand on the same footing as the rest of the cargo.

In *Delaware Ins. Co. v. Winter, Latimer, & Co.* 38 Pa. St. 176, the vessel, bound on a voyage from Baltimore to Portland, Oregon, was obliged to put into Rio Janeiro in a damaged condition. After a survey, she was condemned and sold. Notice of abandonment was given of ship and cargo, and a total loss claimed. The cargo, consisting of perishable articles insured only against total or general average loss, was very much deteriorated, and was sold at Rio.

The underwriters contended that the loss of cargo was not total, and that by the terms of the policy they were not liable for a partial loss on perishable articles.

It was shown, in addition to proof of the damaged condition of the cargo at Rio, that there were no means of shipping it thence to Portland.

The Court held that a constructive total loss of the cargo was shown, citing *Roux v. Salvador*, 3 Bing. N. C. 266; 3 Kent Com. *328; 1 Arnould Ins. *990; 2 id. *1008.

In respect to the point raised by the underwriters, that there could be no constructive total loss as to memorandum articles insured free from particular average, the Court cited the following authorities: "If there be a total loss of the voyage by reason of shipwreck or any other casualty, and there be no means to forward the cargo, there is no distinction between the memorandum articles and the rest of the cargo. The total loss applies equally

to the whole." (3 Kent Com. *297; French Code de Commerce, art. 609; 2 Arnould Ins. *1206; *Poole v. Protection Ins. Co.* 14 Conn. 47.)

"If the question turn on the totality of loss, unconnected with the subject of deterioration of the cargo in value or reduction in quantity, there is no difference between memorandum and other articles. If the loss be total in fact, or is such as the insured is permitted to treat as such, he is entitled to abandon, and to recover as for a total loss in the case of memorandum articles, but always with the exception that he is not permitted to turn a partial into a total loss. . . .

"The rule, therefore, deducible from these and many other authorities," says the Court, "is that wherever the cargo may, on account of injuries from perils insured against, be abandoned as for a total loss, memorandum articles stand on the same footing as others."

In *Poole v. Protection Ins. Co.* 14 Conn. 47, hides were insured from Mobile to New York, free from particular average. The vessel was wrecked near Nassau, in the Bahamas. The hides were submerged in the wreck; but eighty-nine out of the whole number (two hundred and eighty) were saved by wreckers; the remainder were lost. Those saved, being in a very bad condition, tending to putrefaction, and being unfit for immediate exportation, were sold at auction at Nassau, and brought, over salvage and other necessary charges, \$39.84, which was remitted to the owners of the vessel for whom it might concern. Notice of abandonment of the hides was given to the underwriter, who insisted that the loss was not total.

The Court held it to be established law that where, as in this case, a total loss of goods insured, with the exception of particular average, is claimed to have taken place by reason of shipwreck or damage to the vessel, the same rule prevails in ascertaining whether such a loss has arisen as if the policy were free from that exception. The Court concludes its opinion on the character of the

loss as follows: "This, therefore, being a case where, if the policy did not contain the memorandum clause, the plaintiff would be entitled to recover as for a total loss of the whole goods insured, and the rule by which such loss is to be ascertained not being waived by such exception, the plaintiffs are entitled to a like recovery."

In *Wallerstein v. Columbian Ins. Co.* 44 N. Y. 240, cargo was insured from Europe to New York "free of particular average only." The policy insured against perils "of the seas, and all other perils, losses, and misfortunes that shall come to the hurt, detriment, or damage of the said merchandise, or any part thereof" (the last four words inserted in writing).

The vessel, with a cargo consisting in part of 801 bags of coffee worth \$27,427, and 64 bales of wool worth \$3,961, bound from Havre to New York, encountered a violent gale on the 24th of January, 1863, by which she was wrecked and totally lost on the coast of New Jersey. She sunk, and remained embedded in the sand. Her cargo was submerged, and her main deck under water at high tide. The locality of the wreck was seventy miles from New York. The assured gave notice of abandonment to the underwriters, which the latter refused to accept. The agents of the ship-owners, assuming to act for the benefit of whom it might concern, but really acting in the interest of the underwriters, employed a company of wreckers to save what they could, at a compensation of sixty per cent. of the net proceeds of the salvage. They saved sixteen bales of wool, of which the net proceeds amounted to \$1,100.02. Some of the coffee, swollen and discolored with sea water, but still recognizable as coffee, was, after some months of labor, fished up, placed in new bags, and sold. Of this, the net proceeds were \$2.44. The vessel and the body of the cargo were utterly lost.

There was evidence to show, and the jury found, that getting up the coffee grains, and bagging and transport-

ing them to New York, was the act of the company itself, and a contrivance to convert a loss actually total into a loss constructively partial. (See report of the case in the lower Court, 3 Rob. 528.)

"On the occurrence of a stranding like that in question," remarks Hunt, C., "resulting in permanent destruction, the voyage is lost by a peril insured against, and the master of the vessel thereupon becomes the agent of the cargo-owners as well as of the owners of the vessel, and must act as the facts of the case require. These facts and his abandonment create a total loss; and the subsequent recovery of the vessel, or of a portion of the goods by extraordinary exertions, does not alter this result. This is salvage service merely, and does not create a general average, nor does it entitle the ship-owners to freight. . . . In the case before us, the stranding of the vessel was, within all the authorities, of such a character as to create a total loss. She was ashore on the most perilous part of the Atlantic coast in the depth of winter, her main deck submerged, and was incapable of restoration. While thus exposed to the peril of a total loss, the master abandons the vessel, and notice is given to the underwriter. The underwriter employs a wrecker, at a great expense, to visit the vessel, who, after a labor of some months, is able to recover a small portion of the cargo: among the rest, some bales of wool, and portions of the coffee so damaged as to be worthless. The jury have found that this effort to recover the cargo was a contrivance simply to convert into a partial what would otherwise be a total loss. In my view of the case, the loss of the coffee was total, and the right to recover became fixed when the abandonment was made. The rescue of a portion of the contents of the vessel, with whatever motive it was done, did not undo what was already done. It could not convert into a partial loss that which, under the circumstances detailed, the law adjudged to be total." Many cases are reviewed in this

opinion, and the case of *Cocking v. Fraser*, 4 Doug. 295, is therein disapproved.

In *Williams v. Cole*, 16 Me. 207, a cargo of potatoes, insured only against total loss, arrived at Baltimore, the port of destination, entirely rotten, having been damaged by sea-water; and by order of the municipal authorities, it was thrown overboard. The Court held "that the cargo was so damaged by perils of the seas as to exist only in the shape of a nuisance. In such a case, the loss is total, without abandonment"; citing 3 Bos. & P. 474; 5 Maule & S. 447; 3 Bing. N. C. 266, on 32 E. C. L. 110; *Roux v. Salvador*.

In *Williams v. Kennebec Mutual Ins. Co.* 31 Me. 455, a vessel laden with potatoes, bound from Augusta to Baltimore, was obliged to put into Key West in distress. The potatoes were then found to be greatly damaged by salt water, being reduced, with the exception of a few at the top, to the consistency of mush. The potatoes were sold at auction for \$192.

The underwriters insisted that this fact showed that the loss was not total. But the Court found that "if any attempt had been made to carry them in the same or another vessel to the port of destination, there can be no reasonable doubt that not one of them would have arrived there in specie, or in an unchanged state or form." "In the state in which they then were," adds the Court, "there is little reason to conclude that they could have been allowed to remain on board consistently with the health of the crew, so long as would be necessary for their conveyance to the port of destination. The probability is strong that they never would have arrived there in any condition." On the authority principally of *Hugg v. Augusta Ins. Co.* 7 How. 595, and *Roux v. Salvador*, 3 Bing. N. C. 266, the Court held the loss to be total. (See also *Parsons v. Manufacturer's Ins. Co.* 82 Mass. (16 Gray) 463.

The modern leading authority in the law of England in respect to what constitutes a constructive total loss of

cargo is *Roux v. Salvador*, 3 Bing. N. C. 266. In that case, a cargo of hides was insured against total loss, from Valparaiso to Bordeaux. The condition of the ship rendered it necessary to put into Rio for repairs. The cargo was there examined, and was found to be in a state of incipient putrefaction from sea damage. As this could not be arrested at Rio, and as the hides, if forwarded to Bordeaux, would, from the progress of decay, have lost their specific character before arriving there, they were sold at Rio as hides for the purpose of being tanned, and were tanned by those who bought them.

The owner of the cargo, without giving notice of abandonment, brought suit for a total loss. In the Exchequer, on appeal, Lord Abinger, in pronouncing judgment, remarked as follows: "In the case before us, the jury have found that the hides were so far damaged by the perils of the sea that they never could have arrived in the form of hides. By the process of fermentation and putrefaction which had been commenced, a total destruction of them, before their arrival at their port of destination, became as inevitable as if they had been cast into the sea or consumed by fire. Their destruction not being consummated at the time they were taken out of the vessel, they became in that state a salvage for the benefit of the party who was to sustain the loss, and were accordingly sold; and the facts of the loss and sale were made known at the same time to the assured. Neither he nor the underwriters could at that time exercise any control over them, or by any interference alter the consequences. It appears to us, therefore, that this was not the case of what has been called a constructive total loss, but of an absolute total loss of the goods: they could never arrive; and at the same moment when intelligence of the loss was received all speculation was at end."

"The contract with the underwriters," remarks Bigelow, J., in *Tudor v. N. E. Mutual M. I. Co.* 12 Cush. 544, "on a cargo for a voyage is, that the goods shall arrive at the

port of destination uninjured by the perils of the sea; and in the case of memorandum articles, that they shall then exist in specie, though partially injured or destroyed. If, therefore, by reason of the perils insured against, it is rendered certain in the course of the voyage that the article insured will inevitably perish or waste away, or that on arrival it will cease to exist, it is a total loss under the memorandum clause; and a sale of the article at an intermediate port, in which the vessel is by reason of distress, will be justified, and the proceeds will become a salvage for the benefit of the party who is to bear the loss. In such case, it is clear that the loss is total; because, if the voyage had been pursued and completed, the article insured would have ceased to exist, and thus been totally lost, within the meaning of the policy at the port of destination. The sale, therefore, at the intermediate port does not at all change the rights of the parties under the policy, but saves something for the benefit of the insurers which would otherwise have been wholly lost." (Parry v. Aberdeen, 9 Barn. & C. 411; Poole v. Protection Ins. Co. 14 Conn. 47; Robinson v. Commonwealth Ins. Co. 3 Sum. 221; Williams v. Cole, 1 Shepl. 207.)

Section 130 provides that, under the circumstances there stated, the insurer is not liable if the insured property arrives at the port of destination entirely worthless (provided, of course, that the perils insured against have not changed it in *specie*).

"There are three cases frequently occurring in practice touching the insurance of memorandum articles:

"1. Where a quantity of memorandum articles of the same species is shipped in bulk, valued in bulk, and insured in bulk.

"2. Where it is shipped in separate packages, but not expressed in the policy by distinct valuation or otherwise to be separately insured.

"3. Where, being shipped in separate packages, it is expressed by distinct valuation or otherwise to be separately insured." (2 McLachlan's Arnould Ins. 905.)

In the first of these classes, it has long been well settled that nothing less than a loss of the entire shipment will entitle the assured to recover.

As to the second class, after some conflict of opinion, it has been decided that no loss of any particular package or packages will amount to a total loss under the memorandum. (*Hedburgh v. Pearson*, 7 Taunt. 154; *Ralli v. Janson*, 6 El. & B. 422; E. C. L. R. vol. 88; *Guerlain v. Col. Ins. Co.* 7 Johns. 527; *Biays v. Chesapeake Ins. Co.* 7 Cranch, 415; *Morean v. U. S. Ins. Co.* 1 Wheat. 219, 227; *Humphreys v. Union Ins. Co.* 3 Mason, 429.)

As to the third class, as each package is separately valued and insured, a loss of any package is a total loss *quoad hoc*, entitling the assured to recover to the extent of the loss. (*Kettell v. Alliance Ins. Co.* 10 Gray, 144.)

There is still another class, where memorandum articles of different kinds of goods are valued in gross and insured in gross.

It seems that in this last class of cases, according to the English authorities, an actual total loss of the whole of any one kind of the designated goods will enable the assured to recover as for a total loss *pro tanto*. Thus in *Duff v. Mackenzie*, 3 Com. B. N. S. 16, the master of a ship insured his "effects," free of average, from Italy to England. The whole were lost, except a chronometer and some other articles. Suit was brought on the policy as for a total loss. The Court held that as "effects" indicated *ex vi termini*—articles of different kinds—the policy must be regarded as insuring each article separately against a total loss.

So where the equipment of an emigrant was partially lost under a memorandum policy on "any goods," it was held that a recovery might be had to the extent of the loss. (*Wilkinson v. Hyde*, 3 Com. B. N. S. 30.)

The American authorities differ on this point. (*Deidericks v. Comm. Ins. Co.* 10 Johns. 234; *Humphreys v. Union Ins. Co.* 3 Mason, 429, 440; 3 Kent Com. *329; 2

Phill. Ins. §§ 1660, 1661; 2 Parsons Mar. Law. 274, note 2; Silloway v. Neptune Ins. Co. 12 Gray, 73; Heebner v. Eagle Ins. Co. 10 id. 131; Kettell v. Alliance Ins. Co. id. 144.) But the preponderance of authority seems to be in favor of the rule laid down in the English cases just cited.

Thus, in *Silloway v. Neptune Ins. Co.* 12 Gray, 73, the memorandum clause provided that the insurers should not be liable for any partial loss on salt, grain, fish, fruits, hides, skins, or other goods that are esteemed perishable in their nature, unless it amounted to seven per cent. on the whole aggregate value of such articles, and happened by stranding. The vessel was laden partly with fruit and vegetables, which were totally lost; partly also with other memorandum articles, which were only partially injured.

The underwriters insisted that the assured could not recover as for a total loss on any one or more different kinds of goods specified in the memorandum, and that they were therefore not liable for a total loss on the fruit and vegetables.

"The position of the defendants," said the Court, "is that the assured cannot recover for one species of memorandum articles, specifically named in the policy, which has been lost, if there are other articles of wholly different species, included in the memorandum, which have not been wholly lost. But this is not a correct interpretation of the contract as applied to the subject-matter. No doubt the rule would be as contended for, if the memorandum articles included in the memorandum consisted of one species only, a part of which was lost. When an insurance is made free from average indiscriminately on an article, the assured cannot recover for a total loss on account of the destruction of a part of such article, although it may have been contained in different packages or bales. But the rule is otherwise when the articles embraced in the exception from partial loss are specifically named, and are of different kinds or species. The true office of the

memorandum is to exempt the underwriters from all partial losses of the thing insured. But when the cargo consists of several distinct species or kinds of articles, all of which are embraced within the memorandum, each forms a separate class or thing, and the exception is to be applied to each separately, considered as an independent subject of insurance. The chief object of inserting an exception of certain kinds of merchandise from particular average is to exempt the insurer from liability for the partial decay or loss of parts of the cargo which have an inherent tendency to deteriorate and waste away, and in regard to which it is difficult to ascertain whether the injury to them has been caused by sea damage or by intrinsic defects. This object is fully attained by regarding each species of merchandise separately designated in the memorandum as a distinct subject of insurance. To illustrate: if salt, grain, fish, and fruit are specifically excepted from partial loss, the tendency to decay in any one of them has no natural or necessary connection with a similar tendency in the others. The same causes which might operate to injure one article might wholly destroy another, and leave a third wholly unaffected. The language of the exception, as inserted in the policy, is founded on this view of the intention of the parties. It is, that the insurer shall not be liable for any partial loss on salt, grain, fish, fruits, hides, skins, or other goods that are esteemed perishable; that is, that the insurers shall not be liable for partial loss on salt, or grain, or fish, or fruit; clearly regarding each enumerated article as separate and distinct from all the others, and implying that the insurers shall be liable for a total loss on each. The construction of the policy is the same as if there were a special exception of each article by itself from partial loss, instead of grouping them together in one clause. This might not be the true interpretation if the exception were, in general terms, of all perishable goods; but it certainly is the only reasonable one when the articles are specifi-

cally named, as in the policy declared on. Such we understand to be the received rule in construing policies where different articles are at risk subject to the same exception. The exception is applied to each article separately. Thus, for example, if sugar and hides are excepted from all losses under a certain per cent. in adjusting a loss, if it amounts on either to the specified percentage, the underwriters are liable. (2 Phill. Ins. § 1785.) By parity of reasoning, we do not see why, in construing the exception of certain articles from any claim for partial loss, each article enumerated is not to be regarded as the subject of a special exception, and if any one is totally lost, why the insurers should not be held liable therefor. No case has been cited by the counsel for the defendants in support of an opposite doctrine. The adjudged cases seem to proceed, on a view of the construction of the memorandum clause similar to that which we have now stated. (*Wadsworth v. Pacific Ins. Co.* 4 Wend. 41; *Humphreys v. Union Ins. Co.* 3 Mason, 429; *Blays v. Chesapeake Ins. Co.* 7 Cranch, 415; *Louisville M. & F. Ins. Co. v. Bland*, 9 Dana, 156.)"

Where the policy contains a condition that the underwriter shall not be liable for losses under a certain percentage, it seems that successive losses incurred during the risk may be added together to make up the percentage; and if the aggregate exceeds the rate specified in the exception, the loss must be made good (but see the *Maine and Massachusetts* case next cited), though this doctrine has been applied with less hesitation in the case of loss of freight and cargo than of loss to the ship. (*Donnell v. Columbian Ins. Co.* 2 Sum. 366; *Blackett v. Royal Exch. Ass. Co.* 2 Crompt. & J. 244; *Brooks v. Oriental Ins. Co.* 7 Pick. 259; *Hagar v. New England M. M. Ins. Co.* 59 Me. 460; *Paddock v. Commercial Ins. Co.* 104 Mass. 522.)

General and particular average cannot, however, be added together to make up an amount exceeding the specified percentage. (2 Phill. Ins. § 1779.)

§ 131. *An insurance confined in terms to an actual total loss does not cover a constructive total loss, but covers any loss which necessarily results in depriving the insured of the possession, at the port of destination, of the entire thing insured.*

Civ. Code Cal. 2712. N. Y. Civ. Code, 1484.

See *Burt v. Maltsters' Ins. Co.* 78 N. Y. 402.

This is simply equivalent to declaring that an insurance in terms against total loss covers only an actual total loss. The preponderance of authority is in conformity with this provision of the Code, though the tendency of some recent decisions is to hold that the condition against liability for partial loss, or for any loss not total on a miscellaneous shipment of goods, some of which are and some of which are not perishable, does not preclude the assured from recovering for a constructive total loss in respect to the latter. (2 Parsons Mar. Law, 340, 342; citing *Kettell v. Alliance Ins. Co.* 10 Gray, 144; *Heebner v. Eagle Ins. Co.* id. 131.)

So it was held in England, in *Adams v. Mackenzie*, 13 Com. B. N. S. 442, where a ship was insured against total loss only, that the underwriter was liable where the vessel received such injuries from sea perils that she was not worth the expense of repair.

Where goods insured only against total loss are necessarily transshipped at an intermediate port from the original vessel to two others, one of which is wrecked and lost with all its cargo before arriving at its destination, while the other arrives in safety, the insurers are liable for the goods lost; though they would not have been liable had all the goods remained on the original vessel, and had the same portion of them been there lost which was lost on the substituted vessels. (*Pierce v. Columbia Ins. Co.* 14 Allen, 322.)

The Court say: "A policy upon goods in a particular ship covers them in another ship, if transshipped by necessity, or under a stipulation in the policy allowing

transshipment. (*Macy v. Mutual M. I. Co.* 12 Gray, 497; *Plantamour v. Staples*, 3 Doug. 1; *Oliverson v. Brightman*, 8 Q. B. 781.) It is admitted that if the names of the two ships into which these goods were transshipped had been originally inserted in this policy, or indorsed thereon by the assured with the authority of the insurers, the cargo of each would have been a distinct subject of insurance. If power to transship had been expressly given in the policy, the result would have been the same. The assured, indeed, could not, by any act of theirs, without the assent of the insurers, separate one subject of insurance into two. But if the separation is made with the assent of both assured and insurers, or their authorized agents, it has the same effect as if the two subjects had always been distinct. Upon the wreck of a vessel and breaking up of a voyage, and the bringing of the cargo into a port of necessity, the right, according to the law of England, and according to our law the duty also, of acting as agent for the best interests of all parties—the underwriters as well as the owners of ship and goods—is cast upon the master; and whatever, under such circumstances, he does fairly and in the exercise of a sound discretion binds all parties in interest. (*Marsh. Ins.* (5th ed. by Shee), 129, 130, 469, 498; 3 Kent Com. *212, *213; *Bryant v. Commonwealth Ins. Co.* 6 Pick. 131; *Jordan v. Warren Ins. Co.* 1 Story R. 353; *Hugg v. Augusta Ins. Co.* 7 How. 609; *Kidston v. Empire Ins. Co.* Law R. 2 Com. P. 357.) It does not appear, and is not to be presumed, that the master in this case did not act with due fidelity and discretion in transshipping the goods at Rio Janeiro into two ships instead of one. The transshipment must therefore be taken to have been authorized by both insurers and assured.

“After such transshipment, the cargoes of the two ships become subject to the different perils of separate voyages, to distinct liens for freight, to independent contributions in case of jettison. The object of limiting an

insurance to total loss is to exclude a claim for a mere partial loss of that subject which is liable to the perils that cause the injury: not to exempt the insurers from liability when those perils destroy the whole subject which is within their operation, because another subject, insured in the same policy, indeed, but undergoing different risks, has not also been destroyed. An insurance upon two ships, or the cargoes of two ships, as an indivisible subject-matter, would be a novelty. There is no more reason for inferring an intention in the parties to treat these goods as one subject of insurance after they had been necessarily separated into two bottoms than if they had been originally described in the policy as partly in one ship and partly in another. In *Entwistle v. Ellis*, 2 Hurl. & N. 555, Baron Bramwell said: "If an insurer" (using the word as contrasted with "underwriter" to designate the assured) "has a right to send goods in several ships, and does so, there are inevitably several risks and several insurances." (See Meredith's *Emerigon*, Ins. chap. 12, § 38, pp. 445, 446.)

Loss of freight by occurrences at intermediate port.—Difficult and embarrassing questions, consequent on disasters to ship and cargo, necessitating a visit to an intermediate port, frequently arise between the ship-owner and the insurer on freight.

The insurer on freight is liable only for losses proximately caused by such perils as are covered by the policy. Consequently, if freight is totally or partially lost to the ship-owner owing to any other cause than the intervention of one of these perils, the insurer is not liable therefor. If the master, when he ought to retain the cargo for the purpose of earning freight for the ship-owner, surrenders it to the shipper, without receiving all the freight to which he may be entitled, the loss is due to his neglect, and not to any peril insured against. (*Hubbell v. Great Western Ins. Co.* 74 N. Y. 246; *Griswold v. N. Y. Ins. Co.* 1 Johns. 205; 3 id. 321; *Jordan v. Warren Ins. Co.* 1 Story, 342; *Herbert v. Hallett*, 3 Johns. Cas. 93.)

In respect to a claim against the underwriter for a partial loss of freight, where sea-damaged goods are sold at an intermediate port, there is great force in the observations of Parke, Baron, in delivering judgment in the case of *Vlierbloom v. Chapman*, 13 Mees. & W. 230. In that case a vessel loaded with rice, from Batavia to Rotterdam, was obliged to put into the Mauritius in distress. The cargo was in such a condition that a sale of it was necessary in order to prevent its destruction by putrefaction. The ship-owner claimed that *pro rata* freight was due. "It was argued," said Parke, B., in delivering the opinion of the Court, "on the part of the defendants, and we think rightly, that the point decided in the case of *Hunter v. Prinsep* was no authority against the defendants; for there the captain wrongfully sold a part of the cargo at an intermediate port, and was in no respect the agent of the shipper in so doing; nor was he made so by the subsequent receipt by the ship-owner, of the proceeds (which operated only as a waiver of one species of remedy by action for the tort), and consequently there was no ground to infer a new contract between the shipper and the ship-owner. But it was said that where the goods were lawfully sold from necessity, the case was different; for that in such a case necessity imposed upon the master the character of agent for the shipper, in addition to his ordinary one of agent for the ship-owner, and that, having that double agency, he might be presumed to have intended to make a reasonable contract between his two principals: that is, on behalf of the ship-owner to give up the goods at the intermediate port instead of carrying them on; and on behalf of the shipper to receive them there, and pay a reasonable freight for the part of the voyage already performed. It is difficult to conceive any conjuncture in which such a presumption could be made; for the agency of the master from necessity arises from his total inability to carry the goods to the place of destination, which dispenses with the performance of that pri-

mary duty altogether, and the right to freight *pro rata* from the presumed waiver on the part of the shipper, of the performance of a duty which the master was ready to execute. At all events, we think that no such presumption can be made in this case. According to the statement in the special case, an emergency had arisen in which, as the law is laid down by Lord Stowell in the case of *The Gratitude*, the authority of agent for the shipper necessarily devolved upon the master to do the best for his interest, and that was to sell, because the cargo was perishable, and would have perished if it had been left at the Mauritius, or been attempted to be carried to its place of destination. The sale, therefore, transferred the property and bound the shipper; but in no other respect did the necessity, under the circumstances of this case, confer on him any agency. But if we suppose that he had a further authority, and that, instead of being the master, he had been the supercargo, and that his sale of the goods had been equivalent to a sale by the defendants, themselves present at the Mauritius, there would have been no reasonable ground to infer a new contract to pay freight *pro rata*, for the ship-owner was not ready to carry forward to the port of destination in his own or any other ship, and consequently no inference could arise that the shippers were willing to dispense with the further carriage, and compel the delivery at the intermediate instead of the destined port. The truth is, that the goods were in the same situation as to the claim of freight as if they had been abandoned by the ship-owner and left behind at Mauritius, and there sold by the owner."

See further, in support of the doctrine of this case, *Lord v. Neptune Ins. Co.* 10 Gray, 114-118; *The Ann D. Richardson*, Abb. Adm. 499; *Miston v. Lord*, 1 Blatchf. 354; *Ogden v. Gen. M. Ins. Co.* 2 Duer, 204, 219; *Williams v. Kennebec M. I. Co.* 31 Me. 455; *Depeyster v. Sun Mutual Ins. Co.* 19 N. Y. 272; *Atlantic Ins. Co. v. Bird*, 2 Bosw.

195; *Hopper v. Burness*, L. R. 1 C. P. D. 329; *Hill v. Wilson*, L. R. 4 C. P. D. 329. •

Though the shipper and ship-owner may make such arrangements as may suit their convenience respecting the surrender of goods at an intermediate port for a less amount of freight than that which would have been earned by the completion of the voyage, the underwriter on freight cannot be compelled to make good the deficiency unless it was caused by a peril insured against. The authorities above cited show that if the master is not ready and willing to carry or forward the goods to their destination, he is not entitled even to *pro rata* freight. If he is ready and willing, he has a right to endeavor to earn his entire freight by sending or forwarding the goods to their destination. (*McGaw v. Ocean Ins. Co.* 23 Pick. 405; *Saltus v. Ocean Ins. Co.* 4 Johns. 138; *Low v. Neptune Ins. Co.* 10 Gray, 119, 121.) Though, if they are in a damaged state, and likely, in consequence, to deteriorate still farther while in transit, he should, if reasonably practicable, first put them in a suitable condition for farther transportation. (*Navone v. Hadden*, 9 Com. B. 30; *Notara v. Henderson*, Law R. 5 Q. B. 346; 7 id. 225.)

If at an intermediate port the master might rightfully have proceeded to carry the cargo to its destination, and thus earn the freight agreed on, and was ready and willing to have done so, but instead of doing so surrendered the cargo to the shipper at the intermediate port, without receiving full freight for the voyage, the underwriter on freight will not be liable for any loss of freight thus incurred. (*Clark v. Massachusetts F. & M. Ins. Co.* 2 Pick. 104; *Lord v. Neptune Ins. Co.* 10 Gray, 120, 121; *Mordy v. Jones*, 4 Barn. & C. 399; *Griswold v. N. Y. Ins. Co.* 1 Johns. 205; *McGaw v. Ocean Ins. Co.* 23 Pick. 405; *Jordan v. Warren Ins. Co.* 1 Story, 342; *Hugg v. Augusta Ins. Co.* 7 How. 595; *Ogden v. General M. I. Co.* 2 Duer, 204; *Saltus v. Ocean Ins. Co.* 4 Johns. 138; 3 Kent Com. *228, *229.)

ARTICLE VIII.

ABANDONMENT.

- § 132. Abandonment, what.
- § 133. When insured may abandon.
- § 134. Must be unqualified.
- § 135. When may be made.
- § 136. Abandonment may be defeated.
- § 137. How made.
- § 138. Requisites of notice.
- § 139. No other cause can be relied on.
- § 140. Effect.
- § 141. Waiver of formal abandonment.
- § 142. Agents of the insured become agents of the insurer.
- § 143. Acceptance not necessary.
- § 144. Acceptance conclusive.
- § 145. Accepted abandonment irrevocable.
- § 146. Freightage, how affected by abandonment of ship.
- § 147. Refusal to accept.
- § 148. Omission to abandon.

§ 132. *Abandonment is the act by which, after a constructive total loss, a person insured by contract of marine insurance declares to the insurer that he relinquishes to him his interest in the thing insured.*

Civ. Code Cal. 2716. N. Y. Civ. Code, 1486.

§ 133. *A person insured by a contract of marine insurance may abandon the thing insured, or any particular portion thereof separately valued by the policy, or otherwise separately insured, and recover for a total loss thereof, when the cause of the loss is a peril insured against—*

1. *If more than half thereof in value is actually lost, or would have to be expended to recover it from the peril;*
2. *If it is injured to such an extent as to reduce its value more than one-half;*
3. *If the thing insured being a ship, the contemplated voyage cannot be lawfully performed without incurring an expense to the insured of more than half the value of the thing abandoned, or without incurring a risk which a prudent man would not take under the circumstances; or,*

4. *If the thing insured being cargo or freightage, the voyage cannot be performed, nor another ship procured by the master, within a reasonable time and with reasonable diligence, to forward the cargo without incurring the like expense or risk. But freightage cannot in any case be abandoned, unless the ship is also abandoned.*

Civ. Code Cal. 2717. N. Y. Civ. Code, 1487.

Goods separately valued may be abandoned.—

It is assumed in the first paragraph of § 132, that any particular portion of the thing insured which is separately valued by the policy is thereby separately insured, and may consequently be separately abandoned.

This appears to be the rule where the policy covers different kinds of articles, each of which is separately valued, for one gross premium.

Thus, in *Deidericks v. Com. Ins. Co.* 10 Johns. 233, sugar, mace, and logwood, the quantity of each being specified, were separately valued. More than half the sugar having become damaged by perils of the sea, the whole of the sugar was abandoned, as for a total loss. It was held that the abandonment was proper. (See also *Ocean Ins. Co. v. Carrington*, 3 Conn. 357; *Kettell v. Alliance Ins. Co.* 10 Gray, 144, 154; *Silloway v. Neptune Ins. Co.* 12 id. 73; 3 Kent Com. *329; *Meredith's Emerigon*, ch. 17, § 8; 1 *Pouget Droit Mar.* 318; *Humphreys v. Union Ins. Co.* 3 Mason, 429, 442; *Wilkinson v. Hyde*, 13 Com. B. N. S. 30.)

But in *Hernandez v. Sun M. I. Co.* 6 Blatchf. 320, insurance was effected on 6,000 boxes of lemons, free of particular average, but liable for loss of part by jettison. Each box of lemons was valued at \$4.25 in the written part of the policy. The printed part of the policy insured against loss of the goods, or any part thereof.

It was claimed by the assured that the contract created a separate insurance of each box of lemons, and that the insurer was therefore liable for a partial loss. But the Court held that, as the insurance was in terms on 6,000

boxes of lemons as an entirety, the designation of the value per box did not constitute a separate insurance on each box. (See also *Entwisle v. Ellis*, 1 Hurl. & N. 549; *Newlin v. Ins. Co.* 20 Pa. St. 312.)

Mr. Phillips, 2 Ins. § 1661, questions the correctness of the decision in *Deidericks v. Com. Ins. Co. of New York*, *supra*, and concludes that "where divers articles of the same cargo are indiscriminately insured in the same policy, against the same risks, a separate abandonment of any one of them cannot be made, though they are separately valued."

Under what circumstances a policy will be held to effect a separate insurance of different kinds of property covered by it is discussed in the learned note to the report of the case of *Schumitsch v. American Ins. Co.* 9 Ins. L. J. 60.

Constructive total loss.—Section 125 defines a constructive total loss as one which gives to a person insured a right to abandon, under § 133. But this definition seems to be incomplete, for under the general law of insurance a case of constructive total loss exists "when the thing insured has been reduced to such a state, or placed in such a position by the perils insured against, as to make its probable destruction or annihilation, though not inevitable, yet highly imminent, or its ultimate arrival, under the terms of the policy, though not hopeless, yet exceedingly doubtful." (2 Arnould Ins. *1052.)

Test of right of abandonment.—"The right of abandonment does not depend upon the certainty, but upon the high probability, of a total loss either of the property or voyage, or both. The insured is to act, not upon certainties, but upon probabilities; and if the facts present a case of extreme hazard, and of probable expense exceeding half the value of the ship, the insured may abandon, though it should happen that she was afterwards recovered at a less expense."

Though the subject may physically exist, yet there

may be a technical total loss to the owner, if the things be taken from his free use and possession. Such are the common cases of total losses by embargoes, by captures, and by restraints and detainments of princes. The right to abandon exists when the ship, for all the useful purposes of the voyage, is gone from the control of the owner; as in the case of submersion, or shipwreck, or capture, and it is uncertain, or the time unreasonably distant, when it will be restored in a state to resume the voyage; or when the risk and expense of restoring the vessel are disproportioned to the expected benefit and object of the voyage." (3 Kent's Com. *321. See *Peele v. Merchants' Ins. Co.* 3 Mason, 27, 41; *Bradlie v. Maryland Ins. Co.* 12 Peters, 397, 398; *Copelin v. Phoenix Ins. Co.* 46 Mo. 211; *Woolw. C. C. R.* 283; 9 Wall. 461; *Ruckman v. Merchants' L. I. Co.* 5 Duer, 342; *The Brig Sarah Ann*, 2 Sum. 206, 215; *Fulton Ins. Co. v. Goodman*, 32 Ala. 108.)

Rule in Massachusetts.—While according to the preponderance of authority the right of abandonment, during a period of imminent peril, depends on the improbability of rescuing the vessel from her perilous condition, even at an expense exceeding half her value, the courts of Massachusetts hold that in case the vessel has met with such a disaster as renders her recovery, though hazardous, not impossible (e. g., where, having been stranded on a ledge of rocks a few miles from her home port, the vessel, on being removed, has sunk), there can be no abandonment if the underwriter will undertake to pay all expenses of an endeavor to rescue and repair the vessel, or will himself undertake to make such endeavor, until the endeavor has been made and has proved unsuccessful. (*Wood v. Lincoln & Kennebec Ins. Co.* 6 Mass. 484.) The insured, according to the law of Massachusetts, has no right to abandon because the ship is in imminent danger of being totally lost. (*Deblois v. Ocean Ins. Co.* 16 Pick. 311.) It is immaterial

how critical the condition of the vessel may have appeared to be at the time of the attempted abandonment, if she has in fact been saved and repaired at an expense not exceeding half her value, the right of abandonment did not exist. (*Wood v. Lincoln & Kennebec Ins. Co.* 6 Mass. 479; *Peele v. Suffolk Ins. Co.* 7 Pick. 256; *Hall v. Franklin Ins. Co.* 9 id. 481, 482; *Deblois v. Ocean Ins. Co.* 16 id. 311; *Commonwealth Ins. Co. v. Chase*, 20 id. 142.)

Section 133 apparently adopts the Massachusetts rule in respect to the criterion of a valid abandonment. In Maine, the same rule seems to prevail as in Massachusetts. (*Downing v. Merchants' M. M. Ins. Co.* 57 Me. 113.)

Form of Boston policy as to abandonment.—After the litigation in the case of *Peele v. Merchants' Ins. Co.* 3 Mason, 27, in which it was held by Mr. Justice Story that an abandonment is valid if made when the vessel is in a condition of such peril as to admit no reasonable hope of saving her, even though she may afterwards be saved at an expense less than half her value, the Boston underwriters introduced into their policies the following clause: "It is agreed that the insured shall not have the right to abandon the vessel for the amount of damage merely, unless the amount which the insurer would be liable to pay under an adjustment, as of a partial loss, shall exceed half the amount insured. (See *Orrok v. Com. Ins. Co.* 21 Pick. 467.)

The result of the adoption of this provision is, that the assured cannot abandon the vessel on account of damage caused by the perils insured against, unless the amount of gross repairs exceeds three-fourths of the value of the vessel when repaired. Thus, suppose the vessel, when repaired to be worth \$20,000, and the repairs to have cost \$12,000. Deducting from this sum one-third new for old, the result is \$8,000—less than half the value of the vessel when repaired. But if the one-third were not deducted, the amount of loss would be \$12,000, or more than half the value of the vessel when repaired,

and would justify an abandonment. The gross cost of repairs must, in the case supposed, exceed \$15,000 to justify an abandonment.

Whether by the general law of marine insurance the deduction of one-third new for old is to be made in determining the quantum of damage for the purpose of abandonment, is a much-disputed question.

Chancellor Kent states that "the half-value which authorizes an abandonment is half the sum which the ship if repaired would be worth without any such deduction." (3 Kent Com. *331; citing *Dupuy v. U. Ins. Co.* 3 Johns. Cas. 182; *Coolidge v. Gloucester Ins. Co.* 15 Mass. 341; *Peele v. Marine Ins. Co.* 3 Mason, 76, 77; *Williams v. Suffolk Ins. Co.* 3 Sum. 270. See also *Phillips v. St. Louis Perpetual Ins. Co.* 11 La. An. 459.)

The Massachusetts authorities generally hold to the contrary (*Sewall v. U. S. Ins. Co.* 11 Pick. 90; *Winn v. Columbia Ins. Co.* 12 id. 279; *Deblois v. Ocean Ins. Co.* 16 id. 303; *Allen v. Commercial Ins. Co.* 1 Gray, 154); and maintain that on general principles, independently of any express agreement, the deduction should be made.

The Supreme Court of the United States, in *Bradlie v. Maryland Ins. Co.* 12 Peters, 378, held in accordance with the law as declared by Chancellor Kent in the passage above cited; that is to say, that in estimating the damage to the ship as the basis for an abandonment, the deduction of one-third new for old is not to be made. "It is understood to be a fixed rule that if the ship require repairs to the extent of more than half her value at the time of the loss, the insured may abandon; for if ship or cargo be damaged so as to diminish their value above half, they are said to be constructively lost. The meaning of the words in the rule 'one-half of the value' has been held to be the half of the general market value of the vessel at the time of the disaster, and not her value for any particular voyage or purpose. The expense of the repairs at the port of necessity, including the expense

of getting the ship afloat if stranded, is the true test for determining the amount of the injury; and such sum is to be taken as will fully reinstate the vessel, and in general with the same kind of materials of which she was composed at the time of the disaster. It has also been considered that the three objects of insurance—vessel, cargo, and freight—stand on the same ground as to a total loss by a deterioration of more than one-half in value.” (3 Kent Com. *329, *330; citing *Center v. American Ins. Co.* 7 Cowen, 564; 4 Wend. 45. See also 2 Phill. Ins. § 1536; *Thwing v. Washington Ins. Co.* 10 Gray, 457.)

If the vessel, being in a port of distress, disabled by the perils of the sea, is there sold, owing to the inability of the master to raise funds to repair her, such sale will create a total loss, for which the underwriters are liable, if the master and the owners were guilty of no default or negligence in not furnishing or raising the necessary funds. (*Ruckman v. Merchants' Louisville Ins. Co.* 5 Duer, 342.) See also in *American Ins. Co. v. Ogden*, 15 Wend. 541, the (dissenting) opinion of Bronson, J. He says: “It was not pretended that the vessel had been damaged to half her value. She was in the port of destination. The master testified that he had no funds whatever on his arrival at St. Thomas; that he had not ever been supplied with money for the ordinary expenses of the voyage. He could not obtain money to make repairs from the consignee, and failed in an attempt to raise it on bottomry. Under these circumstances, the insurers insisted that the mere want of funds to make repairs in the port of destination did not constitute a valid ground for abandoning; but the learned judge charged the jury ‘that the inability of the master to procure the necessary funds at St. Thomas was a valid cause of abandonment.’ I cannot subscribe to this doctrine. The assured sends out the vessel without furnishing the master with a single dollar to pay any necessary expenses; he has no credit with his correspondent, the consignee, nor with any one else residing at the

place to which the vessel is sent, and he is still permitted to recover as for a total loss, on the single ground of the inability of the master to procure the necessary funds to make repairs; and this, too, without reference to the extent of damage to the schooner in comparison with her value. Want of funds to repair damages has sometimes been taken into consideration in connection with other circumstances; and in a port of *necessity* it may be an important if not a controlling fact. But no case was cited on the argument, and I think none can be found in the books, where the want of funds in the port of *destination* has of itself been held a sufficient cause of abandonment."

On appeal to the Court of Errors, the views of Bronson, J., were sustained in the opinions delivered by Chancellor Walworth, 20 Wend. 302; Senator Verplanck, 306-314, and Senator Wager, 317-320. (See also *Allen v. Commercial Ins. Co.* 1 Gray, 154.)

In *Greene v. Pacific Mutual Ins. Co.* 9 Allen, 226, the doctrine on this subject is thus laid down by Bigelow, C. J.: "The duty of the master or other agent of the owners is the same whether the inability of a vessel to continue a voyage, caused by the effects of a peril insured against, consists in damage to the vessel arising from the effects of the winds and waves, or by the loss of officers and crew, or want of some materials or equipment necessary to render her fit for the further prosecution of the voyage. In such a case, if the vessel is in a port of necessity in a foreign land, at a great distance from the home port, where there are no means of communicating with the owners and receiving advice or aid from them except after the lapse of a long period of time, extending over several months or a year, and the master or agent of the owners is unable, with the use of due diligence, to procure money to repair and refit the ship for the voyage, or cannot procure the needful equipment or materials, or supply the officers and crew necessary to the continuance and prosecution of the voyage within a reasonable time, it cannot

be said that there is any negligence or dereliction of duty in breaking up and abandoning the voyage insured. On the contrary, such a state of things might be sufficient to create a necessity which would warrant a sale of the vessel for the benefit of whom it might concern, and justify a claim for a total loss, although the actual injury to the ship might be less than half her value. (2 Phil. Ins. §§ 1537, 1578; 2 Arnould Ins. 1083.)"

"The rule is general," remarks Bigelow, J., in this case, "that the assured on any subject may abandon when a voyage is broken up and lost in respect to that subject, by the perils insured against." (2 Phill. Ins. §§ 1521, 1523; 2 Arnould Ins. 1071; *Falkner v. Ritchie*, 2 Maule & S. 290; *Brown v. Smith*, 1 Dow, 359; *Parsons v. Scott*, 2 Taunt. 363; *Doyle v. Dallas*, 1 Moody & R. 55; *Alexander v. Baltimore Ins. Co.* 4 Cranch. 370; *Smith v. Universal Ins. Co.* 6 Wheat. 176; *Bradlie v. Maryland Ins. Co.* 12 Peters, 378, 401; *Ruckman v. Merchants' Louisville Ins. Co.* 5 Duer, 342, 366.)

Basis of valuation for total loss.—The authorities are not agreed in respect to the basis of valuation on which the loss of fifty per cent. is to be estimated. Chancellor Kent (3 Com. *331) states that the value of the ship at the time and place of the accident is the true basis of calculation. This is in accordance with the decisions of the Supreme Court of the United States in *Patapsco Ins. Co. v. Southgate*, 5 Peters, 604, and *Bradlie v. Maryland Ins. Co.* 12 id. 378.

In England the value of the ship when repaired, to the owner, is generally the criterion, as well in valued as in open policies, by which the right of abandonment in consequence of damage sustained from perils insured against must be tested. Such right does not, however, exist according to the law and usage there prevailing, unless the repairs would cost more than the value of the vessel when repaired. (*Somes v. Sugrue*, 4 Car. & P. 274; *Morris v. Robinson*, 3 Barn. & C. 196; *Young v. Turing*, 2 Man. &

G. 601; 40 Eng. C. L. 533; *Irving v. Manning*, 1 Com. B. 168; 2 id. 784; 1 H. L. Cas. 287; *Stewart v. Greenock Ins. Co.* 6 C. C. S. 359.)

For the purpose of determining under the English law whether a vessel was so far damaged as not to be worth repairing, her value when repaired was held (the vessel being of exceptional size and class) to be the amount that an owner, wanting such a vessel for the particular purposes of his trade, would be willing to give for her. The evidence showed that the vessel was valued in the policy at £17,000, and was insured for £16,000; that the cost of repairing her after the disaster would have been £10,500, and that her value after being repaired would have been £7,500, but that an owner wanting such a vessel would have elected to repair her, as such a vessel could not have been built or purchased for £10,500. The loss was held to be total, in the presumption that she was worth, to her owners, who had insured her for £16,000, more than £10,500. (*Grainger v. Martin*, 2 Best & Smith, 456; 4 id. 9.)

In Massachusetts the valuation of the vessel contained in the policy is deemed conclusive for the purpose of determining the proportion of the damages sustained to the value of the vessel. (*Deblois v. Ocean Ins. Co.* 16 Pick. 303; *Hall v. Ocean Ins. Co.* 21 id. 472; *Orrok v. Commonwealth Ins. Co.* 21 id. 456; *Allen v. Commercial Ins. Co.* 1 Gray, 154.)

Such also appears to be the rule in France, according to a preponderance of authority. (See 2 Pouget *Droit Mar.* p. 25.)

In the case of *The American Ins. Co. v. Ogden*, 20 Wend. 299, Chancellor Walworth took occasion to express his opinion very strongly in favor of the rule that the value of the vessel as stated in the policy is to be considered her true value upon the question of abandonment; and in opposition to the views of Mr. Justice Story on that point. as set forth in *Peele v. Merchants' Ins. Co.* 3 Mason,

27. "If," inquires the learned Chancellor, "in the case of her utter destruction, the underwriters would not be permitted to prove that she was not worth half as much when she was lost as when the voyage commenced, why should the assured be permitted to prove that she had deteriorated to that extent in order to make an abandonment as for a total technical loss, which could not be otherwise maintained?" It must be conceded that there seems to be some inconsistency in holding that a vessel valued at \$10,000, and insured for that sum, may be abandoned in a port of distress where her value happens to be only \$6,000, for a loss requiring \$3,100 to repair; while at the same time the assured, in the event of her total destruction, would receive \$10,000, the valuation stated in the policy. (See *Deblois v. Ocean Ins. Co.* 16 Pick. 312; *Allen v. Comm. Ins. Co.* 1 Gray, 154.)

In computing a constructive total loss of the ship, the question is, what will it cost to completely and thoroughly repair the vessel, not merely what will render her seaworthy. (*Lincoln v. Hope Ins. Co.* 8 Gray, 22; *Center v. American Ins. Co.* 7 Cowen, 465; 4 Wend. 45.)

Estimate of damages.—The cost of taking a vessel from the port where she is stranded to the nearest port at which she can be completely repaired, is to be taken into consideration in estimating whether the loss amounts to fifty per cent. (*Lincoln v. Hope Ins. Co.* 8 Gray, 22; 14 id. 320.)

The wages and provisions of the crew during the repairs are not estimated as a part of the loss, except so far as they enter into the cost of the repairs. But a reasonable allowance is made for the necessary custody of the vessel during repairs and for superintendence, which allowance should be charged to the amount of labor, subject to the customary deduction of one-third. (*Hall v. Ocean Ins. Co.* 21 Pick. 472.)

In estimating the amount of damages sustained by the ship in order to determine whether they justify an aban-

donment as for a constructive total loss, it is held that where a common peril of destruction is imminent to ship and cargo, and the most convenient mode of saving both is by one and the same operation, the expense of this operation and the proportion of such expense due by the ship must be taken into account. (*Sewall v. U. S. Ins. Co.* 11 Pick. 90. See *Lincoln v. Hope Ins. Co.* 8 Gray, 22; *Ellicott v. Alliance Ins. Co.* 14 Gray, 320; 2 Phill. Ins. § 1551; *Bradlie v. Maryland Ins. Co.* 12 Pet. 378.) Also *Kemp v. Halliday*, 118 E. C. L. (6 Best & Smith) 723, Law R. 1 Q. B. 520, in which case it was held that the contribution due to the ship by the cargo for its proportion of the expense of such operation for the common benefit is also to be taken into account in determining whether the amount of damage to the ship justifies an abandonment as for a total loss.

As general average claims in favor of the assured pass by abandonment to the underwriter (*Maggrath v. Church*, 1 Caines, 196), the assured who has not received payment of a claim of this description is entitled to include his entire loss in the estimate of the amount of his damages with a view to abandonment. But if he has received payment of such claim, or has in his own hands the means of paying it, the amount must be deducted from the damages he has sustained. (*Pezant v. Nat. Ins. Co.* 15 Wend. 453; *Jumel v. Marine Ins. Co.* 7 Johns. 424; 2 Phill. Ins. § 1551; *Potter v. Providence Ins. Co.* 4 Mason, 298.)

In Massachusetts it is well settled that, under the Boston form of policy, a general average loss is not to be added to a partial loss, to make up a constructive total loss. (*Ellicott v. Alliance Ins. Co.* 14 Gray, 318; *Orrok v. Com. Ins. Co.* 21 Pick. 456; *Hall v. Ocean Ins. Co.* id. 472; *Sewall v. U. S. Ins. Co.* 11 id. 90; *Reynolds v. Ocean Ins. Co.* 22 id. 191; *Greely v. Tremont Ins. Co.* 9 Cush. 415.) After the arrival of the vessel, otherwise than as a mere wreck, at her port of destination, an abandonment for a constructive total loss cannot be made. (See 2 Phill.

Ins. § 1555. *Pezant v. National Ins. Co.* 15 Wend. 453; *Merchants' Marine Ins. Co. v. New Orleans Ins. Co.* 24 La. An. 305; *Burt v. Brewers' Ins. Co.* 78 N. Y. 400.)

The decisions of the French courts, based principally on article 369 of the Code de Commerce, hold that, in determining the extent of the loss or deterioration of the assured property with a view to abandonment, the amount of its liability for a general average contribution is not to be taken into account. (1 Pouget Droit Mar. 263; 2 id. 29.) Note by Rogron to article 369, Code de Commerce, which provides as follows: "An abandonment of the insured property may be made in case of capture, of shipwreck, of stranding with breakage, of innavigability from perils of the sea, in case of arrest by a foreign power, in case of loss or deterioration of the assured property, if such loss or deterioration amounts to at least three-fourths. It may be made, in case of arrest by Government, after the voyage has commenced."

Sale by master.—Where ship and cargo are in a position of such extreme peril as to create a case of constructive total loss, the master, acting for the benefit of all concerned, has the right, in a case of necessity, to sell them. "If the sale of the vessel is rendered necessary by a peril insured against, the insured may still abandon, and claim a total loss, if the sale was caused in no way by his default. And if, after an abandonment but before the underwriters can take possession, the master sells the vessel, this act will be considered as done by him as agent of the underwriters; and if the facts at the time of the abandonment showed the loss to be total, the sale will not in any way affect the rights of the assured." (2 Parsons Mar. Law, 344, 345. See *Dunning v. Merchants' M. M. Ins. Co.* 57 Me. 113.)

The result of the authorities, English and American, is, that if the vessel is in a condition of such extreme peril that, according to the best and soundest judgment that can be formed, a sale is a necessary measure for the pro-

tection of the interests of all concerned, the master will be justified in making it; and if the exigency of the peril is so urgent that he has not time to consult the owners, then (and then only) he may make the sale on his own sole responsibility. (*Acatos v. Burns*, L. R. 3 Ex. D. 282; *Knight v. Faith*, 15 Q. B. 649; *Hunter v. Parker*, 7 Mees. & W. 342; *Robinson v. Com. Ins. Co.* 3 Sum. 220 227; *Idle v. Royal Ex. Ass. Co.* 3 Moore, 115; *Hall v. Franklin Ins. Co.* 9 Pick. 477; *The Sarah Ann*, 2 Sum. 215; 13 Peters, 387; *Prince v. Ocean Ins. Co.* 40 Me. 481 (reviewing many cases); *Fitz v. Galiot Amélie*, 2 Cliff. 440; 6 Wall. 18; 2 Phill. Ins. §§ 1577, 1578. See *supra*, p. 269.)

The subsequent rescue of the vessel, even at a small expense, from the destruction with which she was menaced, though a circumstance of some importance in determining whether the sale was made in good faith and dictated by sound judgment as to its necessity, is by no means conclusive on these points. (2 Arnould Ins. *1096; *Ship Fortitude*, 3 Sum. 228; *Fontaine v. Phoenix Ins. Co.* 11 Johns. 295; *Peele v. Merchants' Ins. Co.* 3 Mason, 27; *Idle v. Royal Exchange Ass. Co.* 3 Moore, 115; *Robertson v. Carruthers*, 2 Stark. 572; *Domett v. Young*, 1 Car. & M. 465; *Gardner v. Salvador*, 1 Moody & R. 116; *Doyle v. Dallas*, id. 48; *Mount v. Harrison*, 4 Bing. 338.)

In the case of the *Cobequid M. I. Co. v. Barteaux*, Law R. 6 P. C. A. 319, the following passage from 1 Arnould's Ins. p. *191, is cited by the Court with approval: "If he (the master) comes to this conclusion (that of selling the ship) hastily, either without sufficient examination into the actual state of the ship, or without having previously made every exertion in his power with the means then at his disposal, to extricate her from the peril, or to raise funds for her repair, he will not be justified in selling, even though the danger at the time appear exceedingly imminent."

In *Stephenson v. Piscataqua Ins. Co.* 54 Me. 77, the Court held the following language: "Viewed from the

master's standpoint, the facts and circumstances must exclude every rational theory that the interests of those he represents would be subserved in any other way than by a sale; or, in other words, to refrain from selling, to a man of ordinary maritime experience and intelligence as a ship-master, must seem to be the violation of a manifest moral duty."

If the master sells, he cannot buy on his own account or that of his owners. To purchase for himself would be in direct conflict with his duty, which is to obtain the best price in his power; while to purchase for his owners would be equivalent to making no sale, as it is obvious that one who, owning property, professes to be at the same time a seller and a buyer of it, really occupies neither position. (*Church v. Marine Ins. Co.* 1 Mason, 341; *Ogden v. Firemen's Ins. Co.* 10 Johns. 178; *Barker v. Marine Ins. Co.* 2 Mason, 369; *Robertson v. Western M. & F. Ins. Co.* 19 La. 227.)

Valid sale by master—abandonment unnecessary.—When a ship is justifiably sold as a measure of necessity in consequence of a peril insured against, the better opinion sustained by a great preponderance of authority is that no abandonment is necessary, as the sale *per se* vests the proceeds in the underwriters. (*Farnworth v. Hyde*, 18 Com. B. N. S. 835 (114 E. C. L.); *Saunders v. Baring*, 34 L. T. N. S. 419; *Mowry v. Charleston Ins. Co.* 6 Rich. 146; *Fuller v. Kennebec M. Ins. Co.* 31 Me. 325; *Smith v. Manufacturers' Ins. Co.* 7 Met. 448; *Gordon v. Mass. F. & M. Ins. Co.* 2 Pick. 249; *Mutual Safety Co. v. Cohen*, 3 Gill, 459; *Rasetto v. Gurney*, 11 Com. B. 176; *Potter v. Rankin*, Law R. 5 Com. P. 341; *The Brig Sarah Ann*, 2 Sum. 210; *Prince v. Ocean Ins. Co.* 40 Me. 482; 2 *McLachlan's Arnould's Ins.* 964. *Contra: American Ins. Co. v. Francia*, 9 Barr. 390.)

Mr. Justice Story remarks, in the case of the *Brig Sarah Ann*, 2 Sum. 210, as follows: "Then, it is said, that as the sale (by the master) was made before the abandonment

was accepted, it was a sale made by the master as agent of the owners; and that by implication the abandonment admits the necessity of the sale and adopts and justifies it. But here again I cannot admit the entire correctness of the argument. When a loss takes place for which an abandonment may be made, the master is not exclusively the agent of the owners of the ship; but he is the agent of those who retroactively become owners of the ship in consequence of that event, if an abandonment is made and is justifiable. The common doctrine is, that the master is the agent of all concerned in the voyage, and that he becomes by relation the agent of the underwriters, whenever an abandonment has been accepted, from the time of the loss to which that abandonment refers, although the abandonment may not have been offered or accepted until months after the event. So that in the present case, if the libelants have finally accepted the abandonment, and it was persisted in by the owners and never withdrawn by them, but was a continuing abandonment on their side, the act of the master in the sale is to be treated as his act as agent of the libelants, and not of the original owners."

In this case the vessel was stranded, and was subsequently justifiably sold by the master, and afterwards abandoned by the owners to the underwriters. The purchasers of the vessel succeeded in getting her off and repairing her. The abandonment was not at the time accepted by the underwriters, but was never withdrawn by the owners. Finally a compromise took place between the owners and underwriters, by which all right and title of the owners in the vessel was assigned to the underwriters, who brought suit in admiralty, claiming title and right of possession to the vessel.

The Court held that the title had already passed to the purchasers under the master's sale, and dismissed the suit.

Construction of third subdivision of § 133.—The third subsection of § 133 was probably intended to

provide for three contingencies in which the ship might be abandoned: 1st. When the voyage could not be lawfully performed. 2nd. When it could not be performed except at an expense of more than half the value of the ship. 3rd. When it could not be performed without incurring a risk which a prudent man would not take under the circumstances.

Abandonment of ship where voyage cannot lawfully be performed.—An embargo, imposed by the government of the assured, whereby the insured vessel cannot lawfully proceed on her voyage by leaving the port, or complete it by entering the port, would seem, under this subsection, to justify an abandonment. (See *Green v. Young*, 2 Raym. Ld. 840; *Schmidt v. United Ins. Co.* 1 Johns. 249; *McBride v. Marine Ins. Co.* 5 Johns. 299; *Walden v. Phoenix Ins. Co.* 5 id. 310; *Odlin v. Washington Ins. Co.* 2 Wash. C. C. 312; *Lorent v. South Carolina Ins. Co.* 1 Nott & McC. 505; *Ogden v. N. Y. F. Ins. Co.* 10 Johns. 177; Code de Commerce, art. 369, 370.)

“Without incurring a risk which a prudent man would not take under the circumstances.”—This clause seems to have been designed for the purpose of covering the case where the insured vessel cannot enter her port of destination without incurring the risk of capture. The question heretofore presented in cases of this character has usually been, whether the circumstances constituted a “restraint of princes,” or “compulsory change of voyage,” within the meaning of those terms in the policy. By the law of England, which differs in this respect from that of France and other continental countries, an abandonment of the voyage occasioned by the interdiction of commerce with the port of destination, after the commencement of the risk, affords no ground of action to the assured. (*Arnould Ins.* *785; 1 *Pouget Droit Mar.* 47; *Brightley’s Emerigon*, ch. 12, § 31.)

The leading case of *Hadkinson v. Robinson*, 3 Bos. & P. 388, holds that where underwriters have insured against

capture and restraint of princes, and the captain, learning that if he enter the port of his destination the vessel will be lost by confiscation, avoids that port, whereby the object of the voyage is defeated, such circumstances do not amount to a peril operating the total destruction of the thing insured.

This case has been recognized ever since as authority in the English Courts, and it is now clearly established that by the law of England "an interdiction of commerce with the port of destination by means of a blockade, or embargo, or possession of the port by an enemy, is not a peril within the policy." (2 Arnould Ins. *788. Shee's Marshall on Ins. 166.)

The principle on which this rule is established is that the peril complained of is merely an apprehension of seizure and confiscation, and that the vessel has not been subjected to any actual restraint, or compelled, otherwise than by motives of expediency, to change her voyage; so that the peril insured against has not acted directly, but only circuitously and remotely, on the subject of the policy.

It would seem that a vessel arriving in the vicinity of her port of destination, and finding it under blockade, especially if she has been warned off by the usual indorsement on her register, might be abandoned under subd. 3 of § 133, inasmuch as the voyage could not be performed without incurring a risk which a prudent man would not take under the circumstances.

Whether, under the general law of insurance, the mere apprehension of capture through breach of blockade or entry into a hostile port will justify an abandonment, is a question on which the American authorities differ. In Massachusetts, it is held that in such case no right of abandonment exists. (*Richardson v. Maine F. & M. Ins. Co.* 6 Mass. 102; *Cook v. Essex F. & M. Ins. Co.* id. 122; *Wheatland v. Gray*, id. 124; *Lee v. Gray*, 7 id. 349; *Tucker v. United M. & F. Ins. Co.* 12 Mass. 288.) The New York

cases hold otherwise. (*Craig v. United Ins. Co.* 6 Johns. 226; *Saltus v. United Ins. Co.* 15 id. 523; *Schmidt v. United Ins. Co.* 1 id. 249; *Saltus v. Everett*, 15 id. 523; 3 Kent Com. *294. See also, in other States, *Lorent v. South Carolina Ins. Co.* 1 Nott & McC. 505; *Thompson v. Read*, 12 Serg. & R. 440; *Savage v. Pleasants*, 5 Binn. 403; *Vigers v. Ocean Ins. Co.* 12 La. 367; *Olivera v. Union Ins. Co.* 3 Wheat. 183; *King v. Delaware Ins. Co.* 2 Wash. C. C. 300.)

Mr. Phillips, after citing and examining numerous authorities on the point (1 Ins. § 1115), arrives at the conclusion that "where, after the risk has begun, the voyage is inevitably defeated by blockade or interdiction at the port of departure or destination, or by a hostile fleet being in the way, rendering the proceeding upon it utterly impracticable, or capture or seizure so extremely probable that proceeding would be inexcusable, the risk continues till the vessel has arrived at another port of discharge adopted instead of that originally intended; and also, that an assured on cargo has a right to abandon. (See Code de Commerce, art. 279.)

Loss by capture, arrest, and detention.—Where the property is captured, arrested, or even detained by an indefinite embargo, the insured may abandon. (3 Kent Com. *319; *Peele v. Merchants' Ins. Co.* 3 Mason, 27.)

An insurance against capture in general terms includes every species of capture, whether lawful or unlawful, and whether by friends or enemies. (3 Kent Com. *304, *305; *Mauran v. Ins. Co.* 6 Wall. 1; *Dole v. N. E. Ins. Co.* 2 Cliff. 394; *Swinerton v. Columbian Ins. Co.* 37 N. Y. 170; *Olivera v. Union Ins. Co.* 3 Wheat. 183; *Wilson v. United Ins. Co.* 14 Johns. 227.) But not a mere revolt by which the master is deprived of his command. (*Snow v. Union Ins. Co.* 119 Mass. 592.) But see as to the term "seizure": *Kleinwort v. Shepard*, 102 E. C. L. (1 El. & E.) 447. As to the terms "arrest," "detention," and "restraint," see 1 Phill. Ins. § 1115; 2 Parsons Mar. Law, 248.

In *Barker v. Blakes*, 9 East, 145, the plaintiff, an Amer-

ican citizen, had insured a quantity of oil on board the American ship *Hannah*, from New York to Havre de Grace, by policy dated August 4th, 1803. On the 17th of August the ship was seized by an English cruiser, and carried into Bristol for search. During her detention there, Havre, the port of her destination, was declared under blockade by the British Government, and so continued until the commencement of suit on the policy. The cargo was subsequently restored to the agents of the assured; but the captain refused to reload and carry it to Havre, and sailed for New York, leaving the cargo at Bristol, where it was sold by consent of all parties. The assured sued for a total loss, but failed because he had not given seasonable notice of abandonment. It was strongly intimated, however, by the Court, that but for this omission he would have been entitled to recover, on the ground that the impossibility of prosecuting the voyage to the place of destination, in consequence of the prolonged detention of the ship, might properly be regarded as a loss of the voyage; and such loss of the voyage, on received principles of insurance law, was to be regarded as a total loss of the goods which were to have been transported in the course of such voyage. (See also *Anderson v. Wallis*, 2 Maule & S. 240.)

In the case of *Rodocanachi v. Elliott*, Law R. 9 Com. P. 518, goods were insured by a marine policy "at and from Japan and (or) Shanghai to Marseilles and (or) Leghorn and (or) London, via Marseilles and (or) Southampton," including, among other risks, those of arrests, restraints, and detainment of all kings, princes, and people, etc. The goods arrived at Paris 13th of September, 1870, in transit through France from Marseilles to Boulogne. Owing to the seizure of the Northern Railway by the German armies, the goods could not be forwarded to Boulogne, and by the 19th of September Paris was completely invested, so that the goods could not be removed. This state of things continued until after October 7th, on which day the assured gave notice of abandonment.

It was held on appeal by the Exchequer Chamber, affirming the judgment of the Court of Common Pleas (Law R. 8 Com. P. 649), that the facts constituted a "restraint of princes," and a detention under the policy. (See also *Geipel v. Smith*, Law R. 7 Q. B. 404; *Olivera v. Union Ins. Co.* 3 Wheat. 183; *Rotch v. Edie*, 6 Term Rep. 413.)

In *Aubert v. Gray*, 3 Best & Smith, 162, the Spanish owners of goods insured them from London to Alicante on board the Spanish ship *Jovellanos* against the usual perils, including arrests, restraints, and detainments of all kings, princes, and people, etc. They also insured the ship by the same policy against the same perils. On the arrival of the ship at Corunna in the course of her voyage, the Spanish Government embargoed and seized her for the purpose of carrying troops to Morocco, with which country the Queen of Spain was then at war. The captain and crew were compelled to remove the goods during stormy and tempestuous weather, and they were by the Queen and her agents placed on the open and uncovered quays at Corunna, whereby the goods were damaged, spoiled, and deteriorated. The claim was for a partial loss on these goods.

The ground of defense was, that as the acts of the Queen of Spain were in judgment of law the acts of the assured, the insurers were not responsible, inasmuch as, according to *Conway v. Gray*, 10 East, 536, every subject of a State is to be deemed a party to the acts of his Government. But this doctrine was disavowed by the Court, and the case of *Conway v. Gray* overruled. The doctrine of *Conway v. Gray* had, indeed, been already overruled in *Bazett v. Meyer*, 5 Taunt. 824. It was declared unsound in *Francis v. Ocean Ins. Co.* 6 Cowen, 404; 2 Wend. 64.

The Court recognized, however, a marked distinction between an embargo in a time of peace between the countries of the assurer and assured, laid on for a purpose

wholly unconnected with hostilities, either existing or expected, and an embargo connected with such hostilities. The Court also intimated that, if the act of seizure was a lawful act under the municipal law of Spain, there might be a question whether such seizure as against a Spanish subject could be considered as a risk within the policy.

Test of validity of abandonment by English and by American law.—According to the English authorities, the right to claim a total loss after giving notice of abandonment depends on the state of facts existing at the time of commencing suit for a total loss. If, before that time, the cause of abandonment no longer exists, the abandonment becomes inoperative. (3 Kent Com. *324; *Naylor v. Taylor*, 9 Barn. & C. 724; *Lozano v. Janson*, 28 Law J. Q. B. 343.) But in the United States it is well settled that, if due and sufficient notice of abandonment is proven, the validity of the abandonment depends on the facts existing at the time of giving notice. (*Bradlie v. Maryland Ins. Co.* 12 Peters, 378; *Marshall v. Delaware Ins. Co.* 4 Cranch, 202; *Pezant v. National Ins. Co.* 15 Wend. 460; *Coolidge v. Gloucester Ins. Co.* 15 Mass. 341.)

The American rule seems to be in accordance with the general maritime law of Europe. (See Meredith's *Emerigon*, ch. 17, § 6, p. 684.)

Abandonment of cargo.—"It seems now clear," says Story, J., in *Marcardier v. Chesapeake Ins. Co.* 8 Cranch, 47, "that a technical total loss may arise from the mere deterioration of a cargo by any of the perils insured against, if the deterioration be ascertained at an intermediate port of necessity, short of the port of destination. In such case, although the ship be in a capacity to perform the voyage, yet if the voyage be not worth pursuing, or the thing insured be so damaged and spoiled as to be of little or no value, the insured has a right to abandon the projected adventure, and throw upon the underwriters the unprofitable and disastrous subject of insurance. It has

therefore been held that if a cargo be damaged in the course of the voyage, and it appear that what has been saved is less in value than the amount of freight, it is a clear case of a total loss. It does not, however, appear that the exact quantum of damage which shall authorize an abandonment has ever become the direct subject of adjudication in the English Courts. The celebrated treatise, *Le Guidon*, ch. 7, art. 1, considers that a damage exceeding the moiety of the value of the thing insured is sufficient to authorize an abandonment. This rule has received some countenance from more recent elementary writers, and from its public convenience and certainty has been adopted as the governing principle in some of the most respectable commercial States in the Union, and perhaps is now so generally established as not easily to be shaken. (1 Johns. Cas. 141; 1 Johns. 335, 406; Marshall Ins. 562, note 92; Park 194.)"

The decision from which this extract is made was pronounced in 1814. The more recent English decisions have not substantially varied the English rule therein stated; while the doctrine that a destruction of more than half the value of the property by the perils insured against creates a constructive total loss, and justifies an abandonment, has become a settled principle of the American law of Marine Insurance. (3 Kent Com. *329, and cases cited.)

According to the English decisions, cargo may be abandoned when it is in such a condition, owing to sea peril, that to carry it to its destination will cost more than it is worth. The late case of *Farnworth v. Hyde*, Law R. 2 Com. P. 204, in which the cases of *Rosetto v. Gurney*, 11 Com. B. 176, *Moss v. Smith*, 9 id. 94, and *Reimer v. Ringrose*, 6 Ex. 263, were considered, thus sums up the law on the subject:

"Where goods are, in consequence of the perils insured against, lying at a place different from the place of their destination, damaged, but in such a state that they can at some cost be put into a condition to be carried to

their place of destination, the jury are to determine whether it is practically possible to carry them on; that is, according to the well-known exposition in *Moss v. Smith*, whether to do so will cost more than they are worth; and that in determining this the jury should take into account all the extra expenses consequent on the perils of the sea, such as drying, landing, warehousing, and reshipping the goods; but that they ought not to take into account the fact that if they are carried on in the original bottom, or by the original ship-owner in a substituted bottom, they will have to pay the freight originally contracted to be paid, that being a charge to which the goods are liable when delivered, whether the perils of the sea affect them or not. And we also agree that *Rosetto v. Gurney* correctly decides that where the original bottom is disabled by the perils of the seas, so that the ship-owner is not bound to carry the goods on, and he does not choose to do so, the jury are not to take into account the whole of the cost of transit from the place of distress to the place of destination, but only the excess of that cost above that which would have been incurred if no peril had intervened."

If the master unjustifiably sells cargo at an intermediate port, the insurer cannot be made liable therefor, as on a constructive total loss. If it be the duty of the master to transport the cargo to its destination in the original ship, or to hire another for that purpose, and instead of taking either course he sells the cargo at the intermediate port, the loss is owing to his neglect or misconduct, for which, unless it amount to barratry, and that risk be covered by the policy, the insurer is not liable. (*Anderson v. Wallis*, 2 Maule & S. 340; *Hunt v. Royal Exchange Ins. Co.* 5 id. 55; *Underwood v. Robertson*, 4 Camp. 138; *Van Omeron v. Dowick*, 2 id. 42; *Thompson v. Royal Exchange Ass. Co.* 16 East, 241; *Navone v. Hadden*, 9 Com. B. 30; *Lawrence v. New Bedford Ins. Co.* 2 Story, 471; *Bryant v. Commonwealth Ins. Co.* 6 Pick. 131; *Currie v. Bombay*

N. I. Co. Law R. 3 Com. P. 72. See *supra*, §§ 127, 128, and notes.

But where the sale is justifiably made in consequence of a peril insured against, the insurer is liable for a total loss. It is usual in such case to give notice of abandonment, but according to numerous decisions already cited, see *supra*, p. 317, this is unnecessary, either because, according to some authorities, the sale *per se* vests the proceeds in the insurers, or because, according to others, the loss is in its nature total. "A right sale passes the property. When the property is passed from the assured by reason and in consequence of a peril insured against, the cargo is lost to him as much as if it was destroyed." (Montague, Smith J., in *Farnworth v. Hyde*, 18 Com. B. N. S. 855. Though the judgment in this case was reversed, see Law R. 2 Com. P. 204, the question of the necessity of an abandonment was not considered by the appellate tribunal. (See *Gernon v. Royal Exchange Ass. Co.* 2 Taunt. 383; *Roux v. Salvador*, 3 Bing. N. C. 266, and cases cited *supra*, pp. 290-292.)

Constructive total loss of goods insured against total loss only.—Goods insured "free of average" or "against total loss only" cannot be abandoned for a mere diminution in quantity or value, owing to a sea peril. (*De Mattos v. Saunders*, Law R. 7 Com. P. 570; 2 Phill. Ins. § 1767.) But where the voyage is necessarily broken up and abandoned, owing to a sea peril, and it is not practicable to transport the cargo to its destination, or where the peril is so imminent as to justify an abandonment of the cargo, and an abandonment is accordingly made, or where the goods in consequence of sea peril cannot arrive in specie at their port of destination, or are in such a condition of putrescence and decay that they cannot be transported farther without danger to the ship or the residue of the cargo, or to the life or health of those on board, there is no distinction between memorandum and other articles. (*Manning v. Newnham*, 3 Doug. 130;

Dyson v. Rowcroft, 3 Bos. & P. 476; Robinson v. Comm. Ins. Co. 3 Sum. 220; Hugg v. Augusta Ins. Co. 7 How. 595; Tudor v. New England Ins. Co. 12 Cush. 554; Poole v. Protection Ins. Co. 14 Conn. 47; Depeyster v. Sun Mutual Ins. Co. 19 N. Y. 272. See *supra*, pp. 286, 292.

By article 369 of the Code de Commerce, the assured may abandon in case of capture, shipwreck, stranding accompanied with breakage, innavigability from perils of the sea; in case of arrest by a foreign power; in case of loss or deterioration of the property insured, if such loss or deterioration amounts to three-fourths.

The French courts have decided that merchandise which has suffered shipwreck, and has been abandoned, is to be considered as totally lost, although by means of a salvage service effected at the place of the disaster it may have been partially recovered and transported in another ship to its place of destination, and there sold at a loss of less than three-fourths. (See 1 Pouget Droit Mar. 67, 68; Journal du Palais, tome 2, de 1851, p. 54; Pardessus Droit Com. tome 3, § 840; note by Rogron to art. 369, Code de Commerce.)

Where cargo insured "free of average," or against total loss only, is landed in a damaged condition owing to sea perils, but a part of it is salable, though not at a profit, and the entire cargo is libeled for salvage in a Court of Admiralty and sold, and the proceeds are distributed under the decree of the Court, the loss is not total, although the entire proceeds of the cargo are thus absorbed. For as the loss from sea peril was but partial, the proceedings in the Court of Admiralty not being the natural or necessary results of that peril, could not change the nature of the loss. (*De Mattos v. Saunders*, Law R. 7 Com. P. 570; 3 Kent Com. *304.) But where the seizure is hostile, and is made for the purpose of asserting and enforcing a forfeiture of the vessel, the seizure is itself a cause of abandonment. (*Stringer v. English & Scottish M. I. Co.* Law R. 5 Q. B. 599.)

A constructive total loss followed by abandonment does not deprive the holder of a bottomry bond, voidable in case of "utter loss," of his right to enforce it against the hypothecated property or its proceeds. The bottomry holder who has insured his interest cannot, therefore, recover against his insurer on proof of such a loss and abandonment, for the property must be absolutely and totally destroyed in order to discharge the borrower. (*Thompson v. Royal Exch. Ass. Co.* 1 Maule & S. 30; *Broomfield v. Southern Ins. Co.* Law R. 5 Ex. 192; 3 Kent Com. *359; *Pope v. Nickerson*, 3 Story, 489; *The Great Pacific*, L. R. 2 Ad. & E. 381; *Stephen v. Broomfield*, Law R. 2 Com. P. 516; *Insurance Co. v. Gossler*, 6 Otto, 645. See *supra*, pp. 149, 151.)

A total loss of a portion of a cargo insured "free of average," or against total loss only, will not entitle the assured to recover on his policy, unless its terms are such as to effect a distinct insurance on such portion. (*Ralli v. Janson*, 6 El. & B. 422, overruling the cases of *Davy v. Milford*, 5 East, 599, and *Hedburgh v. Pearson*, 7 Taunt. 154.) The doctrine of these cases was never generally accepted by the American courts. (*Biays v. Chesapeake Ins. Co.* 7 Cranch, 415; *Waln v. Thompson*, 9 Serg. & R. 115; *Humphreys v. Union Ins. Co.* 3 Mason, 435. See also *Wadsworth v. Pacific Ins. Co.* 4 Wend. 33; 3 Kent Com. *329; and *supra*, pp. 292, 293.)

So far as regards loss or damage to the cargo by sea peril, the American rule, that where it exceeds one-half of the value of the property the assured may abandon and claim a total loss, though not unknown to the law of continental Europe, is not recognized in the English courts. For instances of the application of the rule, see *Ludlow v. Columbia Ins. Co.* 1 Johns. 335; *Vanderheuvell v. United Ins. Co.* 1 Johns. 406; *Moses v. Columbian Ins. Co.* 6 id. 219; *Hart v. Delaware Ins. Co.* 2 Wash. C. C. 346; *Clarkson v. Phoenix Ins. Co.* 9 Johns. 1; *Waddell v. Columbian Ins. Co.* 10 id. 61.

It seems that no abandonment for a loss exceeding fifty per cent. of the cargo can be made after any considerable portion of it has arrived in good condition at the port of destination. (*Forbes v. Manufacturers' Ins. Co.* 1 Gray, 371; *Seton v. Delaware Ins. Co.* 2 Wash. C. C. 175.)

Constructive total loss of freight.—The undertaking of the insurer on freight is that the goods shall not be prevented from reaching their destination by any of the perils covered by the policy; if, therefore, they are prevented from arriving at the destined port by the direct intervention of those perils, whereby the freight owner is deprived of the power of receiving his freight from the shipper, the insurer is liable. If it is a policy on freight of a cargo laden on board the vessel for the voyage described, especially when the vessel has sailed on that voyage, the policy attaches to the freight of that particular cargo. It follows, therefore, as a general rule, with some exceptions, that after the policy has so attached to that vessel and cargo for that voyage, if the vessel is wholly lost by one of the perils insured against, the power of earning the freight is lost, and the insurer is liable on his contract. In respect to what constitutes a total loss of a vessel involving a total loss of freight, some difference of opinion exists between the rule of the English law and that of America, the former considering that she is not totally lost if, in the place where she is, under all circumstances, she can be repaired and put in a condition to prosecute the voyage at a cost less than her value when repaired; whereas, it is held in America that the vessel sustains a constructive total loss, which the owner, if he choose, may treat as a total loss by abandonment, if she cannot be repaired for less than half her value, making customary allowances. (*Lord v. Neptune Ins. Co.* 10 Gray, 113; *Thwing v. Washington Ins. Co.* id. 455; *Jordan v. Warren Ins. Co.* 1 Story, 342; *Everth v. Smith, 2 Maule & S.* 278.)

Abandonment of freight—when useless.—An

abandonment of freight for a constructive total loss can only be made when a possibility exists that the underwriter may thereby be enabled to receive from the shipper a portion at least of the insured freight. Where there is nothing to abandon, an abandonment is equally unnecessary and ineffectual. (*Roux v. Salvador*, 3 Bing. N. C. 266; *Lord v. Neptune Ins. Co. supra*; *Potter v. Rankin*, Law R. 5 Com. P. 341.)

Thus, if at an intermediate port the cargo, in consequence of perils insured against, is in such a condition that it is not practicable to carry or forward it to its destination so that it shall arrive there in specie, such cargo is considered as actually totally lost, and no abandonment is necessary; and as an actual total loss of cargo necessarily produces a total loss of the freight to be earned by its transportation to the destined port, it seems to follow that in such case there is a total loss of freight on such cargo. (See *Lord v. Neptune Ins. Co.* 10 Gray, 116; *Whitney v. N. Y. Fire Ins. Co.* 18 Johns. 207; cases cited *supra*, p. 283; also *Vlierbloom v. Chapman*, 13 Mees. & W.; and cases under § 131, last paragraph but two.)

In the case of *Lord v. Neptune Ins. Co. supra*, the sum of \$6,000 was insured on the freight (valued at that sum) of the bark *Dana*, from New York to Havre. The cargo consisted principally of wheat, flour, and other perishable articles. On the third day out the vessel encountered a violent gale, necessitating the jettison of a considerable quantity of wheat and flour. The vessel then returned to New York for repairs. The residue of the cargo was necessarily discharged; most of it was found damaged, but had it been dried and prepared for reshipment, which would have required several months, part of it might have been carried on board the *Dana*, or a substituted vessel, to the port of destination, and there delivered in specie. The *Dana* was repaired at a moderate expense; she took in another cargo, sailed for Belfast, Ireland, delivered her cargo there, and earned freight on that cargo.

The owners of the damaged residue of the cargo which had been brought back to New York, though they had notice of the condition of the goods, declined to receive them or to give any directions on the subject; in consequence of which the master sold them at auction, and the proceeds were paid over to the ship-owners, who refused to pay them over to the respective shippers and owners of the goods, except subject to the payment of freight, which they insisted on deducting. Suit was brought against them, and it was decided that no freight was due. See cases last referred to. The insurers on freight claimed a total loss, but the Court held that no such loss had occurred; that when goods are shipped on board of a vessel to be carried to a designated port, whether consisting of perishable or other articles of merchandise, if they remain in specie and arrive, the shipper, on delivery, will be bound to pay the stipulated freight, although the goods are damaged by perils of the sea so as to be utterly worthless; that although the voyage may be retarded, though the goods may be long detained at an intermediate port, and be found to be much damaged, but still can be carried on to the place of destination, and then delivered in specie; if the ship-owner, or the master as his agent, where it is most for the interest of the ship-owner and owner of the goods, leaves them or sells them at such port of refuge, he fails indeed to earn the freight which he might have earned; but such failure is not caused by the perils insured against, but by the voluntary act of the assured, and so the underwriter on freight is not liable for such loss.

The Court farther decided that no abandonment could have aided the plaintiff's case, holding that if the loss was not an actual total loss in its nature, an abandonment would not have enabled the assured to recover on it as in the case of a constructive total loss. An abandonment must be of some part or portion of the subject insured. If that subject, whatever it is, is absolutely gone beyond

the control of the assured, though there may be proceeds of sale or other salvage, yet of that the insurer will have the benefit without abandonment. This distinction was the sole ground of decision in the case of *Roux v. Salvador*, before cited. (See *Smith v. Manufacturers' Ins. Co.* 7 Met. 448.) If the assured has already received it at the time of adjustment, the insurer will have credit for it as a deduction from the total loss; if not, and if a total loss is paid to the assured, anything received by the assured afterwards, by himself or his agents, he will hold to the use of the insurer, and an action will lie for it.

Considering abandonment, then, as strictly applying to the subject of insurance, and in this case to the freight, there was clearly nothing to abandon. No freight *pro rata itineris peracti* had been earned, because the goods were brought back to the port of shipment; there was no valuable right to earn freight by forwarding the goods capable of being transported to Havre, because it would cost more than the freight to forward them. There was no freight earned on that voyage which, according to the American rule, but contrary to the English rule, could have been apportioned, so that an equitable part might vest in the abandonee of the ship, and another part in the abandonee of the freight, so that the same rule which governs the right of the assured on freight to recover a total loss, as held in the English courts, is applicable to the case. That such loss of freight if not total in its nature cannot be converted into a technical total loss by abandonment, seems to be well settled. (*Green v. Royal Exch. Ass. Co.* 6 Taunt. 68; *Idle v. Royal Exch. Ass. Co.* 8 id. 755; 3 Moore, 115; *Mount v. Harrison*, 4 Bing. 388; 1 Moore & P. 14.) An offer to abandon, or an actual formal abandonment of freight in this case, would not have altered the character of the loss.

The Court held that the master was entitled to retain the damaged goods, to prepare and reship them to their destination, and thus earn his freight thereon; citing *Mordy*

v. Jones, 4 Barn. & C. 394; *Grißwold v. N. Y. Ins. Co.* 1 Johns. 204; and *McGaw v. Ocean Ins. Co.* 23 Pick. 405. That having, as agent for the owners of the goods, sold them instead of so doing, the loss of freight on them was not caused by any of the perils insured against. That as to the goods jettisoned, the freight on them was totally lost by a sea peril, and consequently there was nothing to abandon. (See notes to § 131.)

Loss of freight by the mistake or misconduct of the master.—Where the proximate cause of loss of freight is the mistake or misconduct of the master, the underwriter on freight is not liable. Thus in *Philpott v. Swann*, 11 Com. B. N. S. 280, a vessel engaged in loading a cargo at Hondeklip Bay, about 180 miles from the Cape of Good Hope, after receiving all her cargo but 120 tons, was obliged to put to sea on account of a violent storm. She sustained damages which it was necessary to repair in order to permit her to complete her lading. She sailed for St. Helena, 1,800 miles off, for repairs, but found on arriving there that they could not be obtained. They might have been obtained at the Cape of Good Hope. The ship then returned to her home port with a deficiency of 120 tons of cargo. Suit was brought to recover freight on this amount of cargo as for a total loss.

The jury found that the master had acted throughout as a prudent, uninsured owner would have done. The Court says: "The proximate cause of the loss was the course which the master pursued in going home instead of repairing at the Cape, and then returning for the rest of the cargo. All that the finding of the jury amounts to is, that the master in going to St. Helena made the choice which a prudent man uninsured would have made of a place in which to repair. But that choice, though apparently prudent, turned out to be mistaken; and so, and not by sea damage, which in itself was capable of repair, and ought to have been repaired if it reasonably could, the loss happened." (See also *Moss v. Smith*, 9

Com. B. 94; Clark v. Mass. Ins. Co. 2 Pick. 104; Lord v. Neptune Ins. Co. 10 Gray, 119.)

If freight is lost to the freight owner, as a direct consequence of the omission of the master to send or forward the cargo from an intermediate port to its destination, the insurer on freight cannot be held responsible for such loss. (American Ins. Co. v. Center, 4 Wend. 45; Scieffelin v. N. Y. Ins. Co. 9 Johns. 21; 3 Kent Com. *210, *213, 2 Arnould Ins. *1139-*1141; Shipton v. Thornton, 9 Ad. & E. 314; Herbert v. Hallett, 3 Johns. Cas. 93; Griswold v. N. Y. Ins. Co. 1 Johns. 205; 3 id. 321; Clark v. Mass. F. & M. Ins. Co. 2 Pick. 104; Bradhurst v. Columbian Ins. Co. 9 Johns. 17; Lord v. Neptune Ins. Co. 10 Gray, 109, 119; Thwing v. Washington Ins. Co. 10 Gray, 457; Jordan v. Warren Ins. Co. 1 Story, 342.)

If no freight *pro rata itineris* has been earned, and the expense of sending on the cargo from the intermediate port to its destination exceeds the amount of freight originally contracted for, there is an absolute total loss of freight, and no abandonment is necessary, because there is nothing to abandon. (Robertson v. Atlantic M. I. Co. 68 N. Y. 145; American Ins. Co. v. Center, 4 Wend. 45-53; Saltus v. Ocean Ins. Co. 12 Johns. 107; Whitney v. N. Y. Firemen's Ins. Co. 18 id. 209; Thwing v. Washington Ins. Co. 10 Gray, 443.)

In the case of Thwing v. Washington Ins. Co. 10 Gray, 443, various questions connected with the constructive total loss of freight consequent on perils incurred by the ship in the prosecution of her voyage, in cases where she has been obliged to put into a port of distress, were elaborately discussed by Bigelow, J. In the course of his opinion, he remarked as follows: "By a contract of insurance on freight, the underwriters agree to make good to the owner of the ship the sum which would have been earned as a compensation for the carriage of the cargo, but for the intervention of the perils insured against. In other words, it is an agreement that the

perils insured against shall not prevent the owner from earning freight on a particular voyage. If a policy is made on the freight of a cargo laden on board of a vessel destined for a designated voyage, the risk attaches to that particular cargo on board of that vessel. It is in effect a stipulation that the insurer will indemnify the owner, if the vessel, owing to one of the perils insured against, is prevented from earning the freight on that cargo. It has therefore been said by this Court, that after a policy has so attached to that vessel and cargo, as a general rule with some exceptions, if the vessel is wholly lost by a peril insured against, the power of earning freight is lost, and the insurer is liable on his contract. (*Lord v. Neptune Ins. Co.* 10 Gray, 113.)

In the application of this rule, the effect of a constructive total loss of the vessel is the same as an actual total loss. This is the necessary result of the legal right which the owner has to abandon his vessel, and give up the voyage for a sufficient cause. The contract of affreightment, and that of insurance on the freight, must be presumed to have been made in contemplation of a contingency which might justify such abandonment. As the ship, cargo, and freight are each proper subjects of insurance, the owner of each may well protect his interest by a policy; and the right of each under his policy cannot be in any way affected or impaired by the existence of insurance on the other subject at risk. (*Lord v. Neptune Ins. Co.* 10 Gray, 121.) Therefore the right of the owner, in case of a constructive total loss, to abandon his vessel, and thereby to lose the power of earning freight, cannot be taken away by the existence of policies on the cargo and freight. Indeed, the insurers on the latter must be presumed to have taken, as one of the risks included in their contract, a constructive total loss of the vessel by one of the perils insured against. Therefore, a technical total loss of the vessel may involve a loss of the freight; because by her lawful abandonment to the underwriters,

and the consequent vesting in them of the title to the vessel, and her capacity to earn freight (if it cannot be otherwise earned), he has lost the freight which he would have earned by the completion of the destined voyage. Such, as we have before said, with some exceptions, is the general rule, and by it the plaintiff is entitled to recover his full freight in this action, unless the transshipment of the cargo to another vessel, and its carriage to the port of discharge for a sum paid to the owners of the substituted vessel, equal to that which would have been paid to the plaintiff if his vessel had completed the voyage and delivered the cargo, takes the case out of the rule, and brings it within a recognized exception to it. No authority in support of such an exception has been cited, nor are we able to find any foundation for it in the principles of law applicable to freight as a subject-matter of insurance. On the contrary, it seems to us to be inconsistent with them.

The elementary definition of the term "freight," as used in policies, is the earnings derived by a ship-owner from the use of his vessel for the carriage of goods. (1 Phill. Ins. § 327; 1 Arnould on Ins. § 89.) If a vessel is lost by perils of the sea, and the cargo is sent forward by the master of another ship, at a rate of freight equal to that which the original vessel would have earned if she had successfully prosecuted her voyage, the owner receives nothing as the earnings of his vessel. The compensation paid for the transportation of cargo by the consignees of the shipper passes into the hands of the owner of the substituted vessel. The insured, in fact, loses, not only the profits which would have accrued to him from the contract of affreightment, if he had fulfilled it by delivering the cargo on his own vessel, but also the expense incurred by him in preparing his vessel for the cargo, taking it on board, and carrying it to the place of transshipment. It cannot be said that under such circumstances freight, in the sense in which it is understood

by the parties to the contract of insurance, has been earned by the assured. The guaranty of the insurer amounts to something more than an agreement that the cargo shall be delivered at the port of destination, so that the amount stipulated to be paid for freight shall be due from the shippers. Such an interpretation of the contract would dissociate freight as a subject of insurance from the vessel by which it is to be earned, and attach it wholly to the cargo; and the policy would cease to be a contract of indemnity, by which the owner of a vessel would be protected against loss by reason of the failure of his vessel to earn freight in consequence of a peril insured against. But it is urged on the part of the defendants, that the loss of a ship at an intermediate port does not necessarily draw after it the loss of the freight, because if the cargo remains, as in the present case, uninjured, so that it can be transshipped and forwarded, it is the duty of the master to send it on. Both branches of this proposition, taken separately, are true. No doubt there are cases where a vessel is disabled by perils of the sea, and is thus lost or abandoned, in which no claim for a total loss of freight, either actual or constructive, can be maintained. If, for example, a part of the prescribed voyage has been accomplished before the happening of the peril which has disabled the ship, and the cargo remains *in specie*, so that it can be sent forward to the port of discharge at a cost less than the moiety of the stipulated freight, no total loss of freight is thereby occasioned. In such case, it is in the power of the owner of the ship, through his agent the master, by a proper exertion of due diligence, to recover a large part of the freight which his vessel had earned prior to her loss. This opportunity he cannot disregard or throw away. The perils insured have not deprived him of his freight, or of the capacity of earning it. It is the neglect and omission of his agent, the master, which prevents him from receiving from the shippers the larger part of the stipulated freight as the earn-

ings of his vessel. But it does not follow that in all cases where the cargo remains in a condition to be reshipped and carried to the end of the voyage, it is the duty of the master, as agent for the owner of the ship, to reship and forward it; or that, if such reshipment is made, and the cargo is forwarded and delivered to the consignees, the stipulated freight is thereby earned, so that no claim for a total loss can in such case be sustained. If, at the intermediate port, the cost of forwarding the cargo in a substituted vessel is as great or greater than the freight stipulated to be paid by the shipper, the owner of the original vessel can earn no freight, in the sense in which this term is used in a policy on the freight of his vessel, by forwarding the cargo.

Nothing can accrue to him, or to the underwriters on freight, by the transshipment and carriage of the cargo. The expense of forwarding the cargo, which is a consequence of a peril insured against, absorbs all that is received for its transportation, and there is no excess of the freight stipulated to be paid for the hire of the original vessel over the cost of sending forward the cargo, which can come either to the owner of the vessel or the underwriter on freight.

The mistake occurs in supposing that the master is obliged, in his capacity as agent for the owner of the vessel, in all cases of disaster to the vessel, to send forward the cargo if it remains in a condition to render its transshipment judicious and expedient. But how is any such duty or burden imposed on the owner of the vessel? Certainly not by virtue of the contract of affreightment. That involves no undertaking that the cargo shall be forwarded to its place of destination, at all events and under all circumstances. On the contrary, it is always subject to the proviso that its performance may be defeated and excused by perils of the sea. Nor can it be said that the contract of insurance on freight imposes on the assured any obligation to forward the cargo after

the loss of the ship, when no part of the stipulated freight which was the subject of insurance can be thereby saved, but the expense of forwarding will equal or exceed the sum to be paid by the shippers. In such case, the goods or the cargo, by being sent forward, can, indeed, earn freight, but not the freight covered by the policy. The lost vessel can earn no freight, nor by sending forward the cargo can anything be saved as her earnings of that part of the voyage which she has performed. There can be in such case no salvage of freight. We by no means intend to say that it may not be the duty of the master to forward the cargo after the loss of the vessel, when it can be done for the same or even a greater freight than was to be paid under the charter-party or bill of lading, for carriage by the original vessel. But such an act by the master, although judicious and expedient, would not deprive the owner of his claim for a total loss of freight. If it did, the law would operate with great inequality and injustice. An owner, in case of the loss of his vessel at an intermediate port, where the master was unable to find another vessel to carry on the cargo, would recover the whole sum insured on his freight. What good reason can be given for depriving an owner of his indemnity under his policy for loss of freight, merely because the master preserves the goods and causes them to be sent forward to the port of destination at a cost which absorbs the whole sum which was to be paid for the freight of the original ship, leaving nothing to be received under the original contract of affreightment? The actual loss to the owner of the ship is the same in both cases. He receives no benefit by the transshipment of the cargo. The only difference is, that the master in the latter case is enabled to do an act which may inure to the benefit of the owner of the cargo. But certainly this is no reason for taking away the owner's right to an indemnity under his policy on the freight of his vessel.

Some of the decisions of the courts in this country

contain *dicta* in which the duty of the master to transship is stated, without any qualification whatever; but it is in none of them determined that this is a duty which in every case devolves on him as the agent of the owner, or of the insurer on freight. It may be difficult to define with accuracy the extent of the master's authority to act for the various parties interested in a voyage, or to fix, definitely, the point at which his agency for one party ceases and for another begins. But we think it may be safely said that whenever and as soon as the owner of a vessel, by perils of the sea, ceases to have any interest either in the ship or freight, so that nothing of either can be saved or protected by any act of the master, his authority to bind the owner is at an end. The subject-matter of the master's agency for the owner of the ship has in such case ceased to exist, and his power to bind his principal ceases with it. The owner himself, if present at the intermediate port under such circumstances, would have no motive or interest in the further prosecution of the voyage. Hence it is, that, although in the ordinary state of things the master is a stranger to the cargo beyond the purposes of safe custody and carriage; yet, in cases of necessity unforeseen and unprovided for, the character of agent for the owner of the cargo may be forced upon him, not by the immediate act of the owner, but by the policy of the law; otherwise valuable property in his possession and control might be left without any means of care or protection. It may be that the owner of the vessel may adopt and ratify a transshipment made by the master, where the voyage is completed and the cargo carried in a substituted vessel for the original freight, leaving nothing as earnings of the lost vessel. The owner of the cargo could in such case make no complaint or objection, because the contract of affreightment would be fully complied with. But such an act of the master, as binding the owner of the ship, would derive its efficacy, not from his original authority, but from the subsequent

ratification. In the absence of any adoption or recognition by the owner, of such transshipment, we know of no principle or authority on which it can be held absolutely binding on him. On the contrary, the more reasonable doctrine is stated in 2 Phill. Ins. § 1634. "If the motives of the master's course are wholly on the side of one party, then he must be presumed to have acted on behalf of such party. See *The Gratitude*, 3 Rob. Adm. 240; *Shipton v. Thornton*, 9 Ad. & E. 333; *Gibbs v. Gray*, 2 Hurl. & N. 22; *Emerigon on Ins.* ch. 12, § 16; § 6 (Meredith's ed.) 343." (See also *Dunning v. Merchants' Mut. M. Ins. Co.* 57 Me. 108; *Atwood v. Sellar*, Law R. 4 Q. B. D. 356; *Rosetto v. Gurney*, 11 Com. B. 176; *Kidston v. Empire Ins. Co.* Law R. 2 C. P. 357.)

In *Lemont v. Lord*, 52 Me. 365, the ship *Waban* was chartered from Cardiff to Rangoon, with a cargo of coal at a freight of £2 per ton. She encountered sea perils which caused a jettison of part of her cargo, and was obliged to put into Mauritius for repairs, and after survey, was condemned. Plaintiff's bark, the *Lemont*, arrived at Mauritius at this time, and the master of the *Waban* told him of the condition of the ship, and intimated that he might require the *Lemont* to carry on the residue of his cargo to Rangoon. It was afterwards agreed between the two masters that the *Lemont* should perform this service for a freight of £2 5s. per ton, being in excess of the entire original freight. A bill of lading was signed for the coal, as shipped by S. A. Hartridge, master of the *Waban*, deliverable to the original consignees; but it did not contain the usual clause requiring the consignees to pay freight. The *Lemont* with her cargo arrived safely at Rangoon, and tendered the coal to the consignees, who refused to receive it. It was thereupon, after proper proceedings, sold at auction, but the proceeds were insufficient to pay the stipulated freight.

The owner of the *Lemont* then sued the owner of the *Waban*, treating him as the real shipper of the coal on

board the *Lemont*, by his agent, the master of the *Waban*. He was nonsuited, on the ground that the authority of the master of the *Waban* to make such a contract on behalf of the owner, under the circumstances stated, was not to be presumed; and in the absence of any proof that he had made or sanctioned it, the plaintiff failed to show any cause of action against him.

The Court adopts with approval the views expressed in *Thwing v. Washington Ins. Co.* 10 Gray, 443, and cites, in support of the conclusion at which it arrived, *Shipton v. Thornton*, 9 Ad. & E. 314; *Bryant v. Com. Ins. Co.* 6 Pick. 143; *Saltus v. Ocean Ins. Co.* 12 Johns. 107; *Treadwell v. Union Ins. Co.* 6 Cowen, 270; *Duncan v. Benson*, 1 Wels. & H. 557; *The Gratitude*, 3 Rob. Adm. 261; *Gibbs v. Gray*, 2 Hurl. & N. 21. See also *Rosetto v. Gurney*, 11 Com. B. 176; *Atwood v. Sellar*, L. R. 4 Q. B. D. 356, 357; *De Cuadra v. Swann*, 16 Com. B. N. S. 772; *Michael v. Gillespy*, 2 Com. B. N. S. 627, 650.

Loss of chartered freight—when total.—The case of *Rankin v. Potter*, 6 L. R. E. & I. A. 83, contains an elaborate discussion as to what constitutes a total loss of chartered freight, and as to the circumstances under which a notice of abandonment is necessary.

The facts of the case were briefly these: In February, 1863, the ship *Sir William Eyre*, being then bound on a voyage from Greenock to Southland, thence to Dunedin in Otago, New Zealand, was chartered by Potter to De Mattos. By the terms of the charter, the ship, after discharging cargo and landing passengers at Otago, was to proceed to Calcutta, and there, "being tight, stanch, and strong, and every way fitted for the voyage," was to take in a cargo to be provided by the charterer, De Mattos, for Liverpool or London; freight, £4 per ton. Potter then effected with Rankin a policy for £4,000 on this chartered freight valued at £5,000. The voyage was described in the policy as "at and from the Clyde to Southland, while there and thence to Otago, New Zealand, and for

thirty days in port there after arrival." Liberty was also given to call at intermediate ports, and touch and stay at any ports or places without prejudice to the policy."

The ship left Greenock December 7th, 1862, and on arriving at Bluff Harbor, on the 23rd April, 1863, immediately afterwards grounded. In the latter part of May she was floated, and a survey held on her. The survey was necessarily imperfect, and a more thorough one was recommended to be made at the first convenient port; but so far as could be ascertained, there was nothing to prevent the vessel from proceeding to her final destination. Some other groundings occurred, and the ship was unable to leave until July 1st for Dunedin, arriving at the port of Dunedin (Port Chalmers) on the 4th. Here the cargo was discharged, and a further examination made, which, however, from the want of proper facilities, was, like the former, imperfect. At Sydney, only eight days' distance, a thorough examination might have been made. It did not appear, however, that the master knew this, and being out of funds, and waiting remittances from his owners, he used the vessel as a depot for coals at Port Chalmers, receiving therefor a rent of about \$4,000. On the 14th April, 1864, having received funds from his owners, he had the ship temporarily repaired, and sailed for Calcutta, arriving there June 7th. De Mattos, the charterer, had failed in December, 1863, and the ship being offered to his agents, they declined to put a cargo on board.

At Calcutta, the damages to the ship were found to be so serious, that to put her in a seaworthy condition would exceed her value when repaired, and it was admitted on the trial that she had sustained such damages at New Zealand from sea perils as would have justified her abandonment. The surveys and estimates of expenses were forwarded to Potter, who, on August 2nd, 1864, on receiving them, abandoned ship and freight to the respective underwriters on those interests.

This case is deserving of notice on account of the difficulty of some of the questions which it presented, and the different opinions formed respecting them by judges of great experience, learning, and ability.

In the Court of Common Pleas, where the case was tried, it was held that there was no actual total loss of freight in consequence of the injuries received by the ship while at New Zealand; and that as no notice of abandonment of freight had been given in a reasonable time, there was no constructive total loss of freight.

On appeal to the Court of Exchequer, this judgment was reversed, and it was held by a majority of the Court that the perils insured against having incapacitated the ship, while at New Zealand, from earning the chartered freight, and the assured being under no obligation to repair her in order to earn freight, but on the contrary being justified, as a prudent man, in abandoning her, the freight was totally lost by the perils insured against; that the assured had not, by abandoning the ship, lost his right to claim for a total loss on freight; that the delay in giving notice of abandonment was sufficiently accounted for by the facts; and that the notice, if necessary, was not too late. Cleasby, B., dissented, maintaining that the judgment below was correct, and suggesting, further, that the case was one in which there could be no partial loss; and as there was not an actual total loss, there could be no constructive total loss, inasmuch as there was no partial loss to be made constructively total by abandonment. He further raised the question whether the insured, having abandoned the ship, had not by his own act prevented the earning of the chartered freight.

Cockburn, C. J., held that the injuries received by the ship at New Zealand were such as to incapacitate her from fulfilling the conditions of the charter to De Mattos, the charterer; and that as the De Mattos was under no obligation to accept any other ship, there was nothing to abandon to the underwriters, and no need, therefore, of

any notice of abandonment. As to the point suggested by Cleasby, B., that the assured had himself, by abandoning the ship, caused the loss of the chartered freight, the Chief Justice regarded it as "altogether untenable in principle," and likely to "lead to very inconvenient consequences."

Lush, J., held that the loss of freight was total and absolute by perils of the seas, and that no abandonment or notice of abandonment was necessary, as there was nothing to abandon.

Kelly and Channell, B. B., concurred in holding that the chartered freight never could have been earned, and was as totally lost when the ship was abandoned to the underwriters as if she had been actually sunk on the voyage to New Zealand. They considered that notice of abandonment, both as to ship and freight, was seasonably given.

From the judgment in the Court of Exchequer an appeal was taken to the House of Lords, and that judgment was there affirmed.

Mr. Justice Brett, in delivering his opinion, held as follows:

That the insurance was against any loss of the freight to be earned on the voyage from Calcutta to England, in consequence of injury to the ship by sea peril during the voyage from England to New Zealand.

That the defendant, the insurer on freight, being no party to the policy on the ship, nothing depending for its materiality on that policy could affect the questions now raised in respect to the policy on freight. Suppose the ship to have been uninsured on her voyage from England to New Zealand. In such case, a prudent owner, on ascertaining the extent of her injuries while there, would not have repaired her. She would therefore have remained a wreck, or been sold as a wreck, and could not have sailed on the voyage from Calcutta to England, on which freight was to have been earned. That as there

was no possibility that freight could be earned, there was nothing to abandon to the underwriter on freight, and consequently no notice of abandonment was necessary. That as the assured could not tender the ship to the charterer at Calcutta in condition to carry cargo, and as the charterer was under no obligation to accept any substituted ship, there was an actual total loss of freight.

Supposing notice of abandonment to have been necessary, the learned judge came to the conclusion, though with some hesitation, that it had been seasonably given. Mr. Justice Mellor's opinion coincided substantially with that of Mr. Justice Brett. He insisted on the necessity of keeping absolutely distinct those considerations which alone affected the policy on the chartered freight from those which would apply to an ordinary case of insurance on the ship, and called attention to the fact that the interest insured in the policy was an interest only in the right to have a cargo provided by the charterer at Calcutta, on the condition that the ship, on arriving there, should be tight, staunch, and strong, every way fitted for the voyage home, notwithstanding any perils of the seas which she might encounter on the voyage to New Zealand, and for thirty days in port after her arrival.

As it was conceded that the condition of the ship when at New Zealand was such as would have justified an abandonment as for a total loss, and the earning of freight from Calcutta to England thereby became practically an impossibility, it was obvious that the terms of the charter party as to the condition of the ship could not be complied with.

There being nothing to abandon—no advantage that the underwriters could have received from notice of abandonment—no such notice was necessary.

As to the question whether, supposing such notice requisite, it had been given in reasonable time, Mr. Justice Mellor concurred in the views of Mr. Justice Brett.

Mr. Justice Blackburn agreed with the two judges who had preceded him in announcing their opinions, except that he did not discuss the question of the sufficiency of the notice of abandonment. He examined at considerable length the authorities on the subject of the necessity of notice of abandonment, and maintained that no notice was necessary, except in cases where the underwriters might possibly derive some benefit from it.

He expressed some doubt as to the authority of *Knight v. Faith*, 15 Q. B. 649, and subjected Lord Campbell's opinion in that case to very severe criticism.

Mr. Baron Bramwell concurred in holding that there was an actual total loss of freight by a constructive total loss of the ship. There was, therefore, nothing to abandon on the policy on freight, and consequently, no necessity for any notice of abandonment.

As to the sufficiency of the notice, supposing notice to have been necessary, Mr. Baron Bramwell thought it was not given in time; but he expressed this opinion with great doubt.

Mr. Baron Martin maintained there could not be a loss of the chartered freight until the plaintiff had elected not to repair the ship, and not to prosecute the voyage from Calcutta. The vessel on arriving at Calcutta was immediately tendered to the charterer's agent, and this was done before the extent of damage was ascertained and the election made not to repair. The charterer's agent refused to fulfill the charter, because the charterer had become insolvent, and no cargo had been provided for the vessel. The earning of freight, therefore, became impossible, not by any peril of the sea, but by the refusal of the charterer to furnish cargo. Suppose the ship had arrived at Calcutta perfectly sound and seaworthy, the freight would equally have been lost to the plaintiffs.

But the delay at New Zealand had been such as to discharge the charterer from his obligation to provide a cargo. The proximate and direct cause of the loss of freight

was the non-existence of cargo; and to bring the perils of the sea to bear upon it, two things must have existed which do not: one, that the charterer was willing to provide cargo, though under no legal obligation to do so; the other, that he had it to provide. For these reasons the learned Baron thought the underwriters not liable.

He further maintained that the assured, by abandoning the ship, had by his own voluntary act deprived himself of the possibility of earning freight, and therefore its loss was due directly and proximately to his own conduct. He also held that the delay of the vessel at New Zealand was so great as to discharge the underwriter on freight, and his conclusion on the whole case was that the underwriters were not liable.

Lord Chelmsford agreed substantially with the views expressed by Mr. Justice Blackburn.

Lord Colonsay thought that the omission of the charterer to furnish a cargo could not be said to be the cause of a loss of the freight. That the charterer was under no obligation to furnish cargo unless the vessel in question was presented to him in a fit condition to carry it, in accordance with the terms of the charter. As to the question of notice of abandonment, he thought that, as there was really nothing to abandon, no notice was necessary. He arrived at the conclusion that there was a total loss of freight by the perils insured against.

Lord Hatherley held that, as the vessel had arrived at Calcutta so damaged by sea perils that she was in no condition to carry cargo to England, there was a total loss of the freight expected to have been earned on the intended voyage from Calcutta to England; that although the extent of the injuries received by the vessel had not been ascertained when she was tendered to the charterer at Calcutta, yet that she had before her arrival at that port become, in consequence of such perils, incapacitated from performing the intended voyage. He concurred with most of his colleagues in holding, for the same reasons

assigned by them, that no notice of abandonment of freight was necessary; and in respect to the insolvency of the charterer, he called attention to the fact that the loss of the freight had occurred before such insolvency.

The perils of the sea prevented the owners from tendering their vessel to the charterer in such a condition as to be capable of earning freight. Solvent or insolvent, he was under no obligation, therefore, to furnish a cargo for her. The loss of freight was consequently caused by a sea peril, and the insurers were liable.

Owner of cargo liable for increased freight.—

If the master transships goods from an intermediate port to the port of destination at an advanced freight, the owner of the goods is liable therefor. (*Hugg v. Augusta Ins. Co.* 7 How. 609; *Mumford v. Com. Ins. Co.* 5 Johns. 262; *Center v. American Ins. Co.* 4 Wend. 45.) Such advanced freight is a charge creating a lien on the cargo, which the owner of the cargo must pay, and it is therefore virtually in the nature of a loss on cargo. (*Dodge v. Union Marine Ins. Co.* 17 Mass. 471.) The result to the owner is the same as if the cargo had been directly damaged by a sea peril to an amount equal to the extra freight. If the owner of the cargo is insured, can he recover for this amount of extra freight as a loss on cargo? In *Hugg v. Augusta Ins. Co.* 7 How. 609, the Court says: "The owner of the cargo is liable for any increased freight arising from the hire of another vessel." To the same effect see 3 Kent Com. *338, note a, and cases there cited. But whether the owner of cargo can call on his underwriter to make good this loss, is a question on which the authorities are at variance. Mr. Parsons, 2 Mar. Law, 439, suggests the following as a rule: "If the goods are sent on for the benefit of the insurer on them, he should be liable for the increased freight, but not if this increased freight might be avoided by a delay which would not be injurious to the goods, and they are sent forward for the benefit of the owner." Citing *Mumford v. Com. Ins. Co.* 5

Johns. 262; *Hugg v. Augusta Ins. Co.* 7 How. 609; *Rosetto v. Gurney*, 7 El. & E. 461, 467; *Dodge v. Union Marine Ins. Co.* 17 Mass. 471; *Shultz v. Ohio Ins. Co.* 1 Mon. B. 336. See also 2 McLachlan's *Arnould's Ins.* 732, and cases there cited; and *supra*, p. 275.

In the case of *Hubbell v. Great Western Ins. Co.* 74 N. Y. 246, which was an action on a policy on freight, it appeared that the ship was stranded, and became a total loss. The greater part of the cargo was taken out, transhipped, and safely delivered at the port of destination, where it was sold, and the proceeds received by the insurers on cargo, to whom an abandonment had been made; held, that this was equivalent to reaching the owner, who was represented by the abandonees of the cargo (see *Allen v. Mercantile Ins. Co.* 44 N. Y. 437); that the owner of the cargo could not, by abandoning to his insurers, prevent the ship-owner from earning freight, and if the latter, by voluntarily surrendering the cargo to the abandonees without payment of freight when freight was due or might have been saved, lost such freight, he could not resort to the insurers on freight. (See also the *Soblomsten*, L. R. 1 E. & A. 293.)

If the vessel is lost, or condemned at the intermediate port, and the goods are forwarded in another vessel by the master, in the rightful exercise of his authority as representative of the ship-owner, this is presumed to be done in fulfillment of the original contract, and the consignee is liable to pay the freight originally contracted for, though it may exceed that paid to the substituted vessel. (*Shipton v. Thornton*, 9 Ad. & E. 214; *Rosetto v. Gurney*, 11 Com. B. 176; *Hickie v. Rodocanachi*, 4 Hurl. & N. 455.)

The insurer on freight is liable to sustain a loss in consequence of the abandonment of the ship, which under the English law transfers to the insurer on the ship the whole freight pending at the time of the abandonment, and under the American law such a proportion of the freight as is earned subsequently to the abandonment. See section 146, and cases there cited.

The provision contained in subsection 4 of section 133, that freightage cannot in any case be abandoned, unless the ship is also abandoned, is new to the law of marine insurance. It seems to ignore the fact that the abandonment of freight or "freightage" may be the result of loss of cargo, though the ship remains uninjured.

§ 134. *An abandonment must be neither partial nor conditional.*

Civ. Code Cal. 2718. N. Y. Civ. Code, 1488.

But it seems that when several kinds of commodities are separately valued in the policy, they may each be separately abandoned, even though the policy may simply insure a gross sum on the whole. (See *supra*, pp. 293, 294.) As the object of an abandonment is to vest the title to the abandoned property in the underwriter, substituting him forthwith as owner in place of the assured, it is obvious that no conditional abandonment can be valid. (See *Pierce v. Ocean Ins. Co.* 18 Pick. 93; *Higginson v. Dall*, 13 Mass. 96; *Gordon v. Mass. F. & M. Ins. Co.* 2 Pick. 249; *Meredith's Emergon*, ch. 17, sec. 6; *Code de Commerce*, art. 372; 1 *Pouget Droit Mar.* 318.)

§ 135. *An abandonment must be made within a reasonable time after the information of the loss, and after the commencement of the voyage, and before the party abandoning has information of its completion.*

Civ. Code Cal. 2719. N. Y. Civ. Code, 1489.

What is a reasonable time must vary with the circumstances of each case. A delay of five days has been held unreasonable (*Hunt v. Royal Exch. Ass. Co.* 5 Maule & S. 47); while in another case a delay of five months was considered no bar to a recovery. (*Bell v. Beveridge*, 4 Dall. 272. See cases cited 2 *Arnould Ins.* *1164-*1167; 2 *Parsons Mar. Law*, 407; 2 *Phillips Ins.* § 1669; *Sansum's Ins. Dig.* title Abandonment, subd. viii., ix.)

The assured is entitled to a reasonable time to satisfy

himself that a good case of abandonment exists. (*Browning v. Provincial Ins. Co. of Canada*, Law R. 5 P. C. 263; *Currie v. Bombay N. I. Co.* Law R. 3 P. C. 72.) Having done so, he must promptly make his election; and if he determines to abandon, must promptly give notice of abandonment to the underwriter. (3 Kent. Com. *320; *Kaltenbach v. Mackenzie*, L. R. 3 C. P. D. 467, 475; 38 L. T. 942; *Gernon v. Royal Ex. Co.* 6 Taunt. 381; *Gardner v. Columbian Ins. Co.* 2 Cranch C. C. 550; *Maryland Ins. Co. v. Ruden*, 6 Cranch, 338; *Duncan v. Koch*, Wall. C. C. 45; *Reynolds v. Ocean Ins. Co.* 22 Pick. 190; *Meredith's Emerigon*, ch. 17, sec. 5; *Beale v. Pettit*, 1 Wash. C. C. R. 241-243; *Kleinwort v. Cassa Maritima*, L. R. 2 App. C. 156.)

In *Kaltenbach v. Mackenzie*, L. R. 3 C. P. D. 475, Brett, L. J., remarks: "I am not prepared to say that if it could be shown that the subject-matter of insurance at the time when the assured has information upon which he would otherwise be found to act (i. e., give notice of abandonment), is in such a condition that it would absolutely perish and disappear before notice could be received, or any answer returned, that that might not excuse the assured from giving notice of abandonment; but I am prepared to say that nothing short of that would excuse him; and although I do not say what I have stated would excuse him, I am not prepared to say it would not."

The Code de Commerce, art. 373, enumerates three classes of losses, arranged according to the geographical position of the place where the loss occurred, and provides that the abandonment must be made within six months after receipt of the intelligence of the loss as to the first class, one year as to the second, and eighteen months as to the third. After the lapse of the period thus limited, the right of abandonment ceases.

Article 374. provides that in all cases where abandonment may be made, and in the case of all other accidents at the risk of the insurers, the assured is required to com-

municate to the insurer the intelligence he has received. Such communication ought to be made within three days after receipt of the intelligence.

"After the commencement of the voyage." This clause is similar to sec. 370 of the French Code de Commerce. The meaning of the enactment seems to be, after the commencement of the risk. An abandonment may, in fact, be made before the commencement of the voyage; as where ship or cargo is insured "at and from" a certain port, the object being to protect the property before the voyage begins as well as after its commencement.

If the voyage has, in fact, been completed, although the vessel may have arrived damaged to such an extent that it will cost more than fifty per cent. of her value to repair her, still if she is in a repairable condition, the right of abandonment does not exist. The voyage, according to the usual stipulation in policies, is not concluded until the vessel is moored twenty-four hours in safety. (1 Arnould, *450; Parage v. Dale, 3 Johns. Cas. 156; Pezant v. National Ins. Co. 15 Wend. 453; Burt v. Brewers' Ins. Co. 78 N. Y. 400. But see 2 Phill. Ins. § 1532.)

So, though a portion of the cargo may during the voyage have been damaged by sea perils to such an extent as would have justified an abandonment, still, if none was in fact made, and any considerable portion of the cargo arrives in safety, the right of abandonment cannot be exercised. (2 Parsons Mar. Law, 376, citing Forbes v. Manufacturer's Ins. Co. 1 Gray, 371; Seton v. Delaware Ins. Co. 2 Wash. C. C. R. 175. See also Silloyay v. Neptune Ins. Co. 12 Gray, 88; Pierce v. Columbia Ins. Co. 14 Allen, 320; cf. Moses v. Columbian Ins. Co. 6 Johns. 219.)

§ 136. *Where the information upon which an abandonment has been made proves incorrect, or the thing insured was so far restored when the abandonment was made that there was then in fact no total loss, the abandonment becomes ineffectual.*

Civ. Code Cal. 2720. N. Y. Civ. Code, 1490.

The validity of the abandonment depends on the condition of the insured property at the time of the notice of abandonment, and not on the information which the assured may have received respecting it. (See 2 Arnould Ins. *993, and cases cited, note *j*.)

But by the law of England, it is held that though the facts were such as to justify the assured in giving notice of abandonment at the time he did so, yet he cannot insist on such notice, and recover as for a total loss, if before he commences his action the thing insured be restored in such a state that he may reasonably be expected to take possession of it. (*Bainbridge v. Neilson*, 10 East, 329; *Maryland & P. Ins. Co. v. Bathurst*, 5 Gill & J. 159; 1 *McLachlan's Arnould's Ins.* 14, 15.)

Thus, while in the United States the right to recover for a total loss on abandonment depends on the facts existing at the time when the abandonment is made, in England it depends on the condition of the facts at the time of bringing the action. (See 2 Phillips Ins. § 1662, and cases cited; 2 Arnould Ins. *994, *995; 2 Parsons Mar. Law, 403.)

The English law differs in this respect, not only from that of the United States, but also from that of continental Europe. (*Meredith's Emerigon*, ch. 17, § 6, p. 686.)

In *Snow v. Union Ins. Co.* 119 Mass. 592, the insured vessel (a whaler) being in a perilous position, jammed in the ice of the Arctic Ocean, was abandoned by her officers and men, who succeeded, after leaving her, in reaching the whaling fleet about fifty miles south. Ten days afterward, some of the officers and men, with some of the ship's boats and whaling gear, having left the vessel and gone home, the vessel was rescued by another whaler, and was taken to the port of San Francisco, California, by the salvors. Before arriving there she was abandoned to the underwriters. The abandonment was contested, on the ground that at the time of making it the loss was not total.

But the Court held that the abandonment related back

to the time of the loss. "If," says Gray, C. J., delivering the opinion of the Court, "the ship herself is once totally lost by a peril insured against, and the master, using due diligence, is unable to regain possession of her in such a condition and under such circumstances as to enable him to pursue the voyage for which she was insured, the right to abandon and to recover for a constructive total loss still remains, without regard to the question whether at some future time, over which the master has no control, he might be able to regain possession of her on payment of salvage, and without regard to the proportion between the amount of the salvage and the value of the vessel.

"In the present case, the leaving of the vessel in the ice, made necessary by a peril insured against, was a constructive total loss, and would clearly have warranted an abandonment to the underwriters at any time before she was rescued. Her subsequent rescue by salvors, her master never being able to recover possession of her so as to prosecute the voyage, did not cut down the total loss to a partial one, but there was still a constructive total loss of the vessel at the time of the abandonment of the vessel to the underwriters." (Citing *Greene v. Pacific Ins. Co.* 9 Allen, 217; *Peele v. Merchants' Ins. Co.* 3 Mason, 27.)

§ 137. *Abandonment is made by giving notice thereof to the insurer, which may be done orally or in writing.*

Civ. Code Cal. 2721. N. Y. Civ. Code, 1491.

§ 138. *A notice of abandonment must be explicit, and must specify the particular cause of the abandonment, but need state only enough to show that there is probable cause therefor, and need not be accompanied with proof of interest or of loss.*

Civ. Code Cal. 2722. N. Y. Civ. Code, 1492.

The American authorities require that the notice of abandonment should state the cause for which the abandonment is made. The underwriters will then have an op-

portunity of determining whether, for the cause assigned, they will accept the abandonment. And the assured cannot avail himself of any other ground than that stated by him at the time of abandoning. (See *Pierce v. Ocean Ins. Co.* 18 Pick. 93; *Suydam v. Marine Ins. Co.* 1 Johns. 181; 2 Arnould Ins. *1163.) There appears to be no such rule in England. (2 McLachlan's Arnould's Ins. 852.)

Any form of notice which gives the underwriter information of the loss by one of the perils insured against, and of the readiness of the assured to abandon all rights, interests, and claims to the subject of the insurance, and the avails and proceeds thereof, is sufficient. (*Heebner v. Eagle Ins. Co.* 10 Gray, 139.)

In *McConochie v. Sun M. I. Co.* 26 N. Y. 477, it was held that a notice of abandonment for loss on cargo is insufficient, unless it states or clearly implies that the loss exceeds half the value of the subject insured. (See *Thomas v. Rockland Ins. Co.* 45 Me. 116.)

In *Currie & Co. v. Bombay M. I. Co.* Law R. 3 P. C. 78, the Court, disapproving of *Parmeter v. Johnson*, 1 Cowp. 541, remark, that the word "abandon" is not necessary in the notice; that if it contains a sufficient intimation of the intention of the assured to give up to the underwriter the property insured, upon the ground of its having been totally lost, it will be sustained.

§ 139. *An abandonment can be sustained only upon the cause specified in the notice thereof.*

Civ. Code Cal. 2723. N. Y. Civ. Code, 1493.

See notes to last section.

§ 140. *An abandonment is equivalent to a transfer by the insured of his interest to the insurer, with all the chances of recovery and indemnity.*

Civ. Code Cal. 2724. N. Y. Civ. Code, 1494.

All rights proprietary and possessory which the assured had at the time of the loss, in respect to the interest in-

sured in the policy, pass by abandonment to the underwriters, who become substituted as the owners of such interest from the date of the casualty which caused the loss. (*Meredith's Emerigon*, ch. 17, § 6; *Code de Commerce*, § 385; *Randal v. Cockran*, 1 Ves. Sr. 98; *Leatham v. Terry*, 3 Bos. & P. 479; *Thompson v. Rowcroft*, 4 East, 34; *Comegys v. Vasse*, 1 Peters, 213-220; *Rogers v. Hosack's Ex'rs*, 18 Wend. 319; *Sun Ins. Co. v. Hall*, 104 Mass. 507.)

Thus any compensation for the loss sustained, whether by general average contributions (*Sturgess v. Cary*, 2 Curt. 59), or by recovery of damages (*Yeates v. Whyte*, 4 Bing. N. C. 272; *Atlantic Ins. Co. v. Storrow*, 5 Paige, 285), or by indemnity from a foreign government (*Rogers v. Hosack's Ex'rs*, 18 Wend. 332; *Gracie v. Palmer*, 8 Johns. 246; *Burnand v. Rodocanachi*, L. R. 5 C. P. D. 424), or by grace and favor of the home government (*Randal v. Cockran*, 1 Ves. Sr. 98)—is due to the abandonees.

In respect, however, to the subrogation of the abandonee to the right of action of the assured against a third party who caused the loss, it seems that this right may be defeated by an agreement, inconsistent with its exercise, made between the assured and such third party prior to the contract of insurance.

Thus, in the case of the *Mercantile Mutual Ins. Co. v. Calebs*, 20 N. Y. 173, the defendants, who were common carriers, received goods from the shippers thereof at the city of New York, to be delivered at various ports in the Western States. The contract of shipment contained a clause to the effect that in case of loss or damage to the goods, for which defendants might be liable, they should have the benefit of any insurance by or for account of the shippers; and should the goods be damaged or destroyed by fire, the freight and charges to and at the place where such loss should happen should be paid by the shippers.

This contract was executed before any insurance was obtained on the goods. The goods while in charge of

defendants were damaged in consequence of a collision with a vessel on the Erie Canal. The goods at the time of damage were insured by the plaintiffs for the respective shippers. The goods were injured to such an extent that they were abandoned to the plaintiffs, sold at auction, and the proceeds paid over to the plaintiffs by consent of the defendants. Plaintiffs paid \$2,373.72 more than they received from the proceeds of the damaged goods, and for this deficiency they sued the defendants, claiming that, by virtue of the abandonment and payment of the loss to the shippers, they were subrogated to all the rights of the latter; that the goods were lost by the negligence of defendants, and that plaintiffs were entitled to recover the amount paid by them as insurers to the shippers of the goods, less the amount of salvage received.

The defendants denied the allegation of negligence, and set up as an additional defense a special contract, whereby, in consideration that defendants would transport all the goods of these shippers at reduced rates, the latter agreed to assume the risk of loss or damage from the dangers of the lake and river navigation, fire, breakage, leakage, etc., and which contract also contained the clause above recited.

It appeared that at the time of payment of the loss by the plaintiffs to the shippers, plaintiffs had no notice of this special agreement of shipment.

The Court of Appeals held that the abandonment had the affect of an assignment of all rights which the insured shippers had against the carrier at the time of the abandonment, and no more; that the special contract was valid; that in the making of this contract by defendants no fraud was contemplated by them; that although the plaintiffs had no notice of the existence of this special contract until after the loss, that was a matter between them and the insured shippers; and if the latter were guilty of a concealment at the time of obtaining the policy, the plaintiff was not bound to pay the loss; but if

payment was made voluntarily, then plaintiff was not entitled to be subrogated to the rights of the shippers (but as to this, see *Ins. Co. v. The C. D. Jr. 1 Woods*, 72); that the plaintiffs took the rights of the shippers of the goods subject to all agreements and equities between defendants and the assured shippers, and the contract being valid, protected the defendants against a recovery by plaintiff. But where the right to exact compensation for the loss from a third party passes by abandonment to the underwriter, any settlement or compromise made, after notice to such third party, between him and the assured will be void as against the underwriter. (*Home Ins. Co. v. Western T. Co.* 33 How. P. R. 102. See, farther, § 141 and notes.)

The property abandoned is known as salvage, which name is also used to designate the service performed by those who, holding no special relation to the property, succeed in rescuing it from a maritime peril; and also the compensation for such service. A constructive total loss is known after abandonment as a "salvage loss," or a "loss with benefit of salvage."

Abandonment subject to existing liens.—The abandonees of the ship take the property, subject to all valid liens existing against her; though, as between them and the assured, questions may arise as to which party shall be ultimately liable for the moneys paid in discharge of such liens. It is obvious that if the assured could turn over the salvage to the underwriter, charged with liens for other expenses than those incurred in consequence of the perils insured against, the act of abandonment might become a mere form, productive of no benefit to the underwriter. (*Williams v. Smith*, 2 Caines, 13; *Allen v. Com. Ins. Co.* 1 Gray, 154.)

Hence, when the ship is abandoned, the lien for seamen's wages up to the time of the casualty which caused the loss should, under the American doctrine of abandonment, be discharged by the owner of the ship; or the

abandonee, in settling the loss, should retain in his hands a sufficient amount to satisfy such lien. (2 Phillips Ins. § 1716. See *Gordon v. Massachusetts F. & M. Ins. Co.* 2 Pick. 249; *Arnould Ins.* *1161.)

Sometimes, as in *Bidwell v. Northwestern Ins. Co.* 19 N. Y. 179, the policy contains a clause warranting the vessel to be free at the time of issuing it, from all liens.

Wages and expenses accruing after the insurers have become owners by the abandonment are of course chargeable to them. (2 Phillips Ins. § 1720.)

Liability of abandonees for salvage.—As it is the duty of the assured to take all reasonable means for the protection and preservation of the property after the occurrence of the casualty which caused the loss, it may sometimes happen that the expense thus incurred in good faith exceeds the value of the salvage, and in this case the abandonees may be liable for the excess. (See *Bradlie v. Maryland Ins. Co.* 12 Peters, 378; *Lohre v. Aitchson*, L. R. 2 Q. B. D. 501, 509; 2 Parsons Mar. Law 418, 419.)

Extent of interest passing by abandonment.—

The interest which the assured has in so much of the property insured as is not covered by the policy does not pass by the abandonment. The abandonment is co-extensive with the interest covered by the policy, and any agreement apparently enlarging it beyond this limit will be strictly construed. (*Cincinnati Ins. Co. v. Duffield*, 6 Ohio St. 200; *Mills v. The Mary E. Perew*, 15 Blatchf. 58. See Code de Commerce, art. 372.)

§ 141. *If a marine insurer pays for a loss as if it were an actual total loss, he is entitled to whatever may remain of the thing insured, or its proceeds or salvage, as if there had been a formal abandonment.*

Civ. Code Cal. 2725. N. Y. Civ. Code, 1495.

In such case there is a virtual abandonment, indicated by the acceptance by the assured of the amount requisite

to satisfy a claim for a total loss. After such acceptance, the assured cannot equitably assert any claim to the insured property, for the loss of which he has received compensation from the insurer. (*Radcliff v. Coster*, Hoff. Ch. 98; *Home Ins. Co. v. Western T. Co.* 33 How. Pr. 107, 110; *The Planter*, 2 Woods, 490; *The Ocean Wave*, 5 Biss. 378; *North of England I. S. S. Insurance Co. v. Armstrong*, L. R. 5 Q. B. 244; *Phill. Ins.* §§ 1723, 1732.)

Rights of abandonee against wrong-doer.—So if the assured had been fully satisfied for the loss, and does not oppose the prosecution of a libel by the insurer in admiralty against the wrong-doer who caused it, such wrong-doer cannot be permitted to raise the question of non-payment of loss, as between the insurer and the assured. (*The Manistee*, 5 Biss. 381.)

It seems that where the underwriter, having paid a loss in full, seeks to recover against a party liable to make compensation to the assured for such loss, the suit should, if in a court of law, be brought in the name of the assured; but that in a court of equity or admiralty, the underwriter may sue in his own name. (*The Frank G. Fowler*, 8 Fed. Rep. 364; *Frelly v. Hall*, 12 How. (U. S.) 468; *Hall v. Railroad Co.* 13 Wall. 372; *Propeller Monticello*, 17 How. 155; *Hart v. Western R. R. Co.* 13 Met. 99; *The Liberty*, 7 Fed. Rep. 226. See also *Simpson v. Thompson*, L. R. 3 App. C. 279, and notes to § 93, and cases cited under last paragraph but one.)

But where the system of pleading which prevails permits an assignee to sue at law in his own name, an abandonee who occupies this position can proceed accordingly.

Where there are several separate underwriters, it has been held that they must all join in one action against the wrong-doer in the name of the assured. (*Swarthout v. C. & N. W. R. R. Co.* 49 Wis. 625; *Ætna Ins. Co. v. Hannibal R. R. Co.* 3 Dill. 1; *Peoria Ins. Co. v. Frost*, 37 Ill. 333.)

In the case of *Clark v. Insurance Companies*, 100 Mass.

509, French owned the schooner *Lena*. On the 29th of September, 1865, he executed to plaintiffs a bill of sale of the schooner, intended as a mortgage for advances made by plaintiffs, and also by the firm of J. Baker & Company. Plaintiffs caused the schooner to be registered in their own name. While the advances were being made, and prior to the execution of the bill of sale, a mortgage had been made to plaintiffs. When the bill of sale was made, it was agreed between plaintiffs and French and J. Baker & Company that the claims of plaintiffs and of J. Baker & Company should thereby be secured *pro rata*. It was also agreed between plaintiffs and J. Baker & Company that plaintiffs should procure insurance on the schooner for the benefit of themselves and J. Baker & Company, but no notice was given to the insurers that the plaintiffs were not the real owners. French retained the management, use, and control of the schooner, at his own expense; and about June 9th, 1866, while at the Bay of Islands, where the vessel had been sent by French, she was purposely and fraudulently run ashore by the master. A fraudulent survey and condemnation were then obtained, and the vessel was sold at auction for \$350, the master being interested in the purchase. On the same day, immediately after the sale, the schooner, being but slightly injured, was got off and carried away by the purchaser. On receiving information of these transactions, plaintiffs gave notice of abandonment, but defendants refused to accept the same. The policy insured, among other things, "against barratry of the master, unless the insured be owner of the vessel."

The underwriters defended on the ground that the assured were to be deemed the owners of the schooner, and therefore the barratry of the master was not insured against; that the insurance must be deemed to have been made as well for French as for Baker & Company; and that as the sale was illegal, and passed no property, the plaintiffs had sustained no loss.

The Court held that plaintiffs had an insurable interest as mortgagees, distinct from that of French; that they had insured this interest, and French had no interest in the policy. That the master was not the agent of the plaintiffs, but of French who appointed him. That the acts of the master were barratrous, and justified an abandonment for a total loss.

After this recovery against the underwriters, the plaintiffs sued the parties who had purchased the schooner at the auction sale, for conversion. (*Clark v. Wilson*, 103 Mass. 219.) The defendants insisted that they were entitled to show that the plaintiffs had abandoned the schooner to the underwriter with the assent of French, and had thereupon recovered as for a total loss. But the Court excluded the evidence. "No question," said Gray, J., delivering the opinion, "is here presented of the title of the insurers to the property itself, nor of their interest in a contract between the assured and another party, existing before and unaffected by the loss; but only of their right against a party previously liable for the very act which caused the loss for which the insurers have paid." After conceding that the effect of an abandonment is to vest in the underwriters, from the time of the loss, the interest of the assured in any right to be compensated for the loss by any other party, the learned judge continues: "It does not, however, follow that abandonment and payment for a total loss will defeat the right of the assured to sue in his own name, or will authorize the underwriters to sue in their name, in trover for a tort already committed. An action of trover is not brought to recover the property itself, but damages for its conversion. The right to bring it is a personal right of action, accruing to the owner at the time of the conversion. The measures of damages is the value of the property at that time, with interest thereon. . . . A transfer of personal property from a rightful owner out of possession will doubtless pass the title, and enable the assignee, upon

demand and refusal, to sue a wrongful holder in trover as for a new conversion. (*Carpenter v. Hale*, 8 Gray, 157; *Tome v. Dubois*, 6 Wall. 548.)

“But it does not destroy the right of action for the previous tort, nor, if the property has meanwhile been diminished in value by the act of the wrong-doer or otherwise, lessen the measure of his liability; nor can it, consistently with the rules of the common law, transfer a personal right of action for a tort, to one who, at the time of its commission, was not the party injured, so as to enable him to sue for that tort in his own name. (*Gardner v. Adams*, 12 Wend. 297; *Day v. Whitney*, 1 Pick. 503; *Crain v. Paine*, 4 Cush. 483.) To hold such a right of action to have been transferred by relation to the time of the commission of the tort would be to keep in abeyance the question against whom the wrong had been committed, to make that question depend upon the validity and effect of subsequent transactions in which the wrong-doer had no part, and to give him opportunity to escape before it could be determined in whose name an action should be brought.”

It was held that the prior recovery against the underwriters as for a total loss was no bar to the action.

The judgment of the Court proceeds on the ground that the plaintiffs had such a property in the insured vessel at the time of the wrongful sale as would enable them to maintain trover; that the abandonment and recovery as for a total loss did not, *ipso facto*, transfer this right of action to the underwriters, so as to enable them to sue in their own names, for the conversion of the property; and that whether the amount to be recovered in the action of trover should belong to the plaintiffs or the underwriters, was a question that did not concern the defendant.

This case was followed by a suit by the underwriters against the mortgagee (*Merc. M. Ins. Co. v. Clark*, 118 Mass. 288), claiming to be subrogated to the rights of the

latter in the damages recovered in the suit in trover. The Court held that they were entitled to such subrogation. (See *Conn. F. I. Co. v. Erie R. R. Co.* 73 N. Y. 399.)

§ 142. *Upon an abandonment, acts done in good faith by those who were agents of the insured in respect to the thing insured, subsequent to the loss, are at the risk of the insurer, and for his benefit.*

Civ. Code Cal. 2726. N. Y. Civ. Code, 1496.

On a valid abandonment the master becomes the agent of the insurer, and the insured is not bound by his subsequent acts, unless he adopts them. (3 Kent Com. *331, citing 2 Phillips Ins. 439, 449; 7 Johns. 514; 9 id. 21; 13 id. 451; 4 Peters, 139; *Natchez Ins. Co. v. Stanton*, 2 Smedes & M. 340.)

Mr. Parsons is of opinion that although the abandonment relates back to the time of the loss, the underwriters are only liable for the *bona fide* acts of the master in respect to the abandoned property during the intermediate period. (2 Parsons Mar. Law, 421, citing *Dederer v. Delaware Ins. Co.* 2 Wash. C. C. 61.) But the authorities are not uniform in maintaining this distinction, the tendency of some of them being to hold that the agency of the master in respect to the abandoned property is in all cases transferred simultaneously with the change of the property effected by the abandonment. (See *Columbian Ins. Co. v. Ashby*, 4 Peters, 138; *Gardere v. Col. Ins. Co.* 7 Johns. 514; *Smith v. Manufacturers' Ins. Co.* 7 Met. 448-453; *Bryant v. Com. Ins. Co.* 6 Pick. 131; *Gould v. Citizens Ins. Co.* 13 Mo. 524; *Phillips v. St. Louis P. I. Co.* 11 La. An. 459; *Mordecai v. Firemen's Ins. Co.* 12 Pick. 512; *Campbell v. Williamson*, 2 Bay, 237; *Mellon v. Bucks*, 17 Mart. (La.) 371; *Delaware Ins. Co. v. Winter*, 38 Pa. St. 188.)

In the case of *Smith v. Touro*, 14 Mass. R. 113, insurance was effected on an American vessel from Havana to Boston. The assured agreed, in case of capture, to prose-

cute a claim for the vessel as Spanish property, until a decree of restoration or condemnation should be pronounced. The vessel was captured on the voyage insured, and carried into Halifax, and while in custody of the prize court, was abandoned to the underwriters. A claim was interposed for the vessel as Spanish property, and a few days after the abandonment she was restored on payment of expenses.

The ostensible Spanish owner then took possession of the vessel, loaded her, and without the consent of any one, proceeded on a voyage to the West Indies.

Suit being brought on the policy for a total loss by capture, the Court held that, as the detention was only temporary, the abandonment, though made for a sufficient cause and in reasonable time, did not entitle the plaintiff to recover for a total loss; that the ostensible Spanish owner was not, after the restoration of the vessel, the agent of the underwriter, but of the assured; that the underwriter's agreement was that the vessel should pursue her voyage in safety, as a Spanish vessel, and if captured, should be restored as Spanish property; that this agreement had been fulfilled, and that the loss was caused, not by any of the perils insured against, but by the fraud of the ostensible Spanish owner, who was the agent of the assured, and not of the underwriter.

It is to be observed in respect to this case, that the assured made no agreement restricting his right of abandonment in the event of capture, and that by the general rule of law applicable to such cases the capture and detention of the vessel under process of the prize court gave the assured, while the restraint continued, the right to abandon. (*Rhineland v. Ins. Co.* 4 Cranch, 28; *Lee v. Boardman*, 3 Mass. 232; *Humphreys v. Union Ins. Co.* 3 Mason, 429, 435; *Murray v. U. I. Co.* 2 Johns. Cas. 263.)

The case was decided as if the policy had contained a clause to the effect that the insurer should not be liable for capture, if the vessel, being claimed by procurement

of the assured as Spanish property, should be restored to the Spanish claimant.

Status of master after abandonment.—The relation of the master to the assured and the underwriters in respect to the question of abandonment is very clearly stated by Chancellor Walworth, in the case of *Dickey v. American Ins. Co.* 3 Wend. 664. In this case, the insured vessel had sustained injuries of such a character as to justify an abandonment, and the owners, on receiving intelligence of the disaster, gave notice of abandonment to the underwriters; but in the mean time the master had repaired the vessel, and she was actually pursuing her voyage in good safety at the time such notice was given. The owners insisted that they were entitled to recover as for a total loss. "I apprehend," said the learned Chancellor, "the question whether the master is the agent of the owner or of the underwriter depends upon the fact of a valid abandonment during the continuance of the total loss. If a valid abandonment is made, it relates back to the time of the disaster; and as to all acts of the master done in good faith and in the discharge of his duty, he is, in that case, to be considered the agent of the underwriter. While it is doubtful whether the assured will exercise his right of abandonment or not, the lawful acts of the master cannot destroy the right to abandon on the ground that he acts as the agent of the assured. But if the master, in the exercise of his legitimate duties as the agent of whom it may concern, has converted a total into a partial loss before abandonment, the fact that the loss is no longer total takes away the right to abandon; and the result is the same if a total loss is converted into a partial one by the acts of a stranger, as in the case of a recapture. While the result is doubtful, the master is not the exclusive agent of either party; but when the rights of the parties are fixed, the result ascertains whether he was the agent of the underwriters or of the assured. If the vessel is abandoned while the

loss continues total, all the intermediate acts are the acts of the underwriters; but if the property be restored before abandonment, the right to abandon is gone, and the acts of the master will be considered the acts of the assured."

If, after the occurrence of a casualty that would have justified an abandonment, the master proceeds to put the ship in permanent repair, the right of abandonment is thereby defeated. (*Humphreys v. Union Ins. Co.* 3 Mason, 429; *Benson v. Chapman*, 6 Man. & G. 722; *Chapman v. Benson*, 5 Com. B. 330; 2 H. L. Cas. 696; *Fleming v. Smith*, 1 H. L. Cas. 513.)

Suing and laboring clause.—Under the clause known as the "suing and laboring clause," which provides that in case of disaster the assured may labor, travel, and sue for the safeguard and recovery of the property, for the expense of which the insurer is to contribute in proportion to the amount insured by him to that of the whole property at risk, it was held, in *Kidston v. Empire Ins. Co.* Law R. 1 Com. P. 544, that "not only the peculiarity of the words, but also the subject-matter to which they relate, point to the application of the clause to all cases in which the underwriter is saved from liability to loss, whether partial or total, and whether an abandonment does or probably may take place or not." (See *Cory v. Boylston F. & M. I. Co.* 107 Mass. 140.)

In *Lohre v. Aitchison*, Law R. 2 Q. B. D. 509, the owner of the insured vessel, after she had received injuries of so serious a character as would have justified her abandonment, incurred large expenses for salvage services, which, though declining to abandon the vessel as a total loss, he claimed the right to recover from the underwriters. But the Court disallowed the claim, on the ground that "the damage done was so great as already to exhaust the policy, and the underwriter could gain nothing from the effort made to save the ship from sinking, unless the plaintiff abandoned." But see this case on appeal, Law

R. 3 Q. B. D. 558, 4 App. C. 7, where it was held that salvage services performed not under any contract with the assured, but by parties acting on their own responsibility, and claiming compensation under the general principles of maritime law, did not come under the suing and laboring clause.

Where the insurance is against total loss only, a claim for expenses incurred under the suing and laboring clause will be disallowed where it is evident from the facts of the case that no danger of a *total loss* existed. (Peninsular Railway Co. v. Saunders, 1 Best & Smith, 41; 2 id. 266; Booth v. Gair, 15 Com. B. N. S. 291; Kidston v. Empire Ins. Co. Law R. 1 Com. P. 535; 2 id. 357.)

§ 143. *An acceptance of an abandonment is not necessary to the rights of the insured, and is not to be presumed from the mere silence of the insurer, upon his receiving notice of abandonment.*

Civ. Code Cal. 2727. N. Y. Civ. Code 1497.

As the validity of the abandonment depends on the circumstances existing at the time of giving notice, and on the sufficiency of such notice, it is obvious that the underwriter's refusal to accept the abandonment cannot deprive it of its legal effect. If the case is not a proper one for an abandonment in respect to the facts, or if the notice is insufficient, then, on the other hand, the underwriter's mere silence should not preclude him from contesting its validity. (Peele v. Merchants' Ins. Co. 3 Mason, 27, 81; Badger v. Ocean Ins. Co. 23 Pick. 347. See, however, Hudson v. Harrison, 3 Brod. & B. 97.)

§ 144. *The acceptance of an abandonment, whether express or implied, is conclusive upon the parties, and admits the loss and the sufficiency of the abandonment.*

Civ. Code Cal. 2728. N. Y. Civ. Code, 1498.

See Code de Commerce, art. 385; Meredith's Emerigon, ch. 17, § 6, p. 686.

In the case of the *Gloucester Ins. Co. v. Younger*, 2 Curt. 322, the insured abandoned to the underwriters, who thereupon took possession of the vessel, repaired her, and then tendered her to her owners, who refused to receive her.

One of the questions raised on the trial of the case was whether the conduct of the underwriters amounted to an acceptance of the abandonment. They contended that, under the law of Massachusetts, where the policy was made and was to be performed, the insurers had a right to take possession of the vessel when an offer of abandonment was made, and seasonably repair and restore it to the insured, and thus perform their contract. (*Wood v. Lincoln Ins. Co.* 6 Mass. 479-486; *Deblois v. Ocean Ins. Co.* 16 Pick. 203; *Reynolds v. Ocean Ins. Co.* 22 Pick. 191; 1 Met. 160.) "But," said Mr. Justice Curtis, delivering the opinion of the Court, "this Court (the U. S. Circuit Court) held, in *Peele v. The Merchants' Ins. Co.* 3 Mason, 27, that the insurer had no such right; and this being a question, not of mere local municipal law, but arising under the law merchant, though this Court must consider with unaffected respect the decisions of that Court on this question, yet they are not binding on our judgments, and we have no right to conform to them when we believe they do not announce the true rule. . . . Being satisfied of the correctness of the decision of this Court in *Peele v. Merchants' Ins. Co.*, and of its conformity with sound principles, I cannot overrule it because the highest Court of the State has, subsequent to that decision, taken a different view of the rights of insurers. The law of the place of the contract being the general law merchant, I am bound to declare, that in my opinion it did not confer on the underwriter the right to take possession, on an offer of abandonment, and repair and restore the vessel, and thus perform his contract."

See, in accordance with this ruling, the cases of *Cincinnati Ins. Co. v. Bakewell*, 4 Mon. B. 541; *Fulton Ins. Co. v. Goodman*, 32 Ala. 108; *Ruckman v. Merchants' Louisville Ins. Co.* 5 Duer, 342.

Possession by underwriters, effect of.—The general rule is, that if the underwriters take possession of a vessel on abandonment, they thereby accept the abandonment, and that they cannot, after repairing her, tender her to the assured as a fulfillment of their contract. (2 Phillips Ins. §§ 1559, 1706 ; Meredith's Emerigon, ch. 17, § 6, p. 685 ; Provincial Ins. Co. v. Le Duc, Law R. 6 P. C. 224.)

Even where, by virtue of a special stipulation or established usage, such right exists, unnecessary delay in completing the repairs and making the tender will be regarded as an acceptance of the abandonment. (Peele v. Suffolk Ins. Co. 7 Pick. 254 ; Norton v. Lexington Ins. Co. 16 Ill. 235 ; Reynolds v. Ocean Ins. Co. 22 Pick. 191 ; Copelin v. Ins. Co. 9 Wall., 461.)

Acceptance of abandonment by implication.—Where underwriters met the day after the loss, and ordered the assured to do the best for all parties, and on the same day received notice of abandonment without objection, but after the lapse of ten months interfered to prevent a sale of the damaged property, it was held that they must, under the circumstances, be presumed to have accepted the abandonment. (Hudson v. Harrison, 3 Moore 288 ; 3 Brod. and B. 97.)

Where owners received intelligence of capture of the insured vessel October 18th, and on the following day gave notice of abandonment, and sent the master's protest to the underwriters, who returned it on the 24th, saying they were satisfied, it was held that the acceptance was complete, although subsequently, on the 24th, and before suit brought, the owner received intelligence of recapture, which proved true, as the vessel reached her destination and earned freight. (Smith v. Robertson, 2 Dow. 474. See, further, Ins. Co. v. Piaggio, 16 Wall. 378 ; Copelin v. Ins. Co. 9 Wall. 461 ; Provincial Ins. Co. v. Le Duc, Law. R. 6 P. C. 224, 243 ; Cincinnati Ins. Co. v. Bakewell, 4 Mon. B. 541 ; 2 Arnould Ins. *1172.)

Where the underwriter, though refusing in terms to accept the abandonment, does an act inconsistent with any other position than that of an abandonee, he will be held to have thereby waived his refusal and accepted the abandonment. (*Hudson v. Harrison*, Brod. & B. 97; *Peele v. Merchants' Ins. Co.* 3 Mason, 27; *Gloucester Ins. Co. v. Younger*, 2 Curt. 337.)

There is a great preponderance of authority in favor of the doctrine that the underwriter who, on a claim for a total loss, takes possession of the vessel for the purpose of repairing her, thereby accepts the abandonment. The Massachusetts authorities, however, hold otherwise. (See cases heretofore cited; also 2 Parsons Mar. Law, 361-364; 2 American Leading Cases, 2nd ed. 379-381.)

The Code de Commerce, art. 385, provides that the insurer cannot, under the pretext of returning the ship, evade the payment of the sum insured.

But if, after refusing an abandonment, the underwriter takes charge of a vessel thrown upon his hands, this is no waiver of his refusal. (*Savage v. Corn. Ex. Ins. Co.* 4 Bosw. 1.)

Policies frequently contain a clause to the effect that in case of disaster no act of either party, with a view of saving the property, shall be considered as a waiver or acceptance of abandonment, but such act is to be considered as without prejudice to the rights of either party. (See *Gloucester Ins. Co. v. Younger*, *supra*.) This provision seems to be merely declafatory of the established law. (*Meredith's Emerigon*, ch. 17, § 4, p. 678; Code de Commerce, art. 381.)

Waiver of Abandonment.—An abandonment, prior to its acceptance, may be waived by any conduct of the assured inconsistent with the complete transfer of the insured interest to the underwriters, and their control over it, as successors in interest to the assured, by virtue of the abandonment.

Thus, if, after an abandonment of a vessel for a total

loss, she is sold in a case of necessity by the master or owner, a purchase by the owner on his own account will be a waiver of the abandonment, even though the underwriter has notice of the time and place of sale. (*Ogden v. N. Y. Fire Ins. Co.* 10 Johns. 177; 12 id. 25; *Abbott v. Sebor*, 3 Johns. Cas. 45.)

If the master, after a constructive total loss has actually occurred, undertakes to repair the ship, so as to enable her to pursue her voyage, he thereby waives the right of abandonment. (*Dickey v. American Ins. Co.* 3 Wend. 658.) If, however, the repairs are merely partial and temporary, made to enable the vessel to reach a port of refuge where full repairs may be obtained, the abandonment will not be affected thereby. Such repairs are, indeed, in the nature of salvage for the benefit of all concerned. (*Saurez v. Sun Mutual Ins. Co.* 2 Sand. 482; *Ruckman v. Merchants' Louisville Ins. Co.* 5 Duer, 369.)

Acts of the master, after abandonment, in respect to the abandoned property, which are consistent with his position as agent of the underwriters, will not invalidate the abandonment. (*Columbian Ins. Co. v. Ashby*, 4 Peters, 139; *Walden v. Phoenix Ins. Co.* 5 Johns. 310; *Clarkson v. Phoenix Ins. Co.* 9 id. 1; *Waddell v. Columbia Ins. Co.* 10 id. 61; *Curcier v. Philadelphia Ins. Co.* 5 Serg. & R. 113; *Lovering v. Mercantile Ins. Co.* 12 Pick. 348.)

These cases depend on the principle that upon an abandonment the master becomes agent of the underwriter; and that whatever he does consistently with that character, in respect to the management or control of the abandoned property, will be ascribed to the underwriter.

The abandonee of a partial interest in the thing insured is under no obligation to take charge of the salvage, or restore or repair the thing insured.

In *Alleghany Ins. Co. v. Ransom*, 69 Pa. St. 498, the owners of the steamer *Indianola* insured her with the Alleghany Company for \$3,500, the steamer being valued in

the policy at \$12,500; and with the Eureka Company for \$5,000.

During the period covered by the policies the steamer was sunk in Red River. Notice of loss was thereupon given, and an agent of both companies, in response thereto, took charge of the wreck, but declined to raise or repair it, or do anything with it. It was afterwards raised by others, and used in the Confederate service. The parties seem to have considered that an abandonment was made and accepted.

The Eureka Company settled the claim against it for \$4,400, and thereupon transferred all its interest in the wreck to the assured. Suit was brought against the Alleghany Company on its policy, and judgment recovered for the full amount, which was paid.

The object of the action now referred to was to compel the Alleghany Insurance Company to pay over to the assured such a proportion of the value (alleged to be \$3,500) of the wreck as the uninsured interest in the vessel bore to its entire valuation, on the ground that the company had taken possession of the wreck and converted it, and were liable to account for this proportion of its value.

The assured recovered a verdict in the lower Court, but judgment was reversed on appeal, on the ground that the facts of the case did not enable the plaintiff to recover. The underwriter had simply declined to raise or repair the wreck. The abandonment only vested in the insurer the interest which he had underwritten ($\frac{35}{125}$), so that, after the abandonment, the assured was still a part owner of the wreck. The underwriter did not prevent him from raising or repairing it, had he thought proper to do so, and the facts disclosed nothing to show any conversion of the wreck by the underwriter, or any money derived by him from it in any manner. (See *Mills v. The Mary E. Perew*, 15 Blatchf. 58.)

§ 145. *An abandonment once made and accepted is irrevocable, unless the ground upon which it was made proves to be unfounded.*

Civ. Code Cal. 2729. N. Y. Civ. Code, 1499.

Acceptance as shown by several of the cases cited under the preceding section may be inferred from the acts of the underwriter, notwithstanding his verbal refusal of acceptance. Whenever he has expressly or impliedly accepted the abandonment, he is bound by virtue of such acceptance to pay for a total loss, unless the acceptance was made under such a mistake of fact as to render it voidable. But his acceptance is not necessary to enable the assured to recover as for a total loss, though it estops the underwriter from denying it. (See notes to § 144.)

§ 146. *On an accepted abandonment of a ship, freightage earned previous to the loss belongs to the insurer thereof; but freightage subsequently earned belongs to the insurer of the ship.*

Civ. Code Cal. 2730. N. Y. Civ. Code, 1500.

This rule is in conformity with the course of American decisions, but in opposition to the law as established in England. It is there held that on an abandonment of the ship, the abandonee not only succeeds to all rights of ownership from the date of the casualty that caused the loss, and is substituted from that time in place of the assured as the owner of the vessel, but also that a contract of affreightment is an entirety, in respect to which there cannot be an apportionment, except by express stipulation, or by act of the parties, such as the voluntary receipt by the shipper of a portion of the cargo at an intermediate port. (See 2 McLachlan's Arnould Ins. 971.)

The whole freight pending at the time of the casualty, and ultimately earned by the ship on her arrival, consequently passes, under the English law, to the abandonee of the ship. (Case v. Davidson, 5 Maule & S. 79.) If, therefore, the owner of a ship separately insures the ship

and the freight on cargo owned by others, and afterwards, during the voyage, abandons the ship to the underwriters thereon, they are entitled to any freight then pending that may be earned on the completion by them of the voyage. The underwriters on freight are not in such case liable to the assured for the loss of the freight, because, though he failed to receive it, the freight had not in fact been lost, but was transferred by his abandonment to the underwriters, who thereby became the owners of the ship.

"The expression, 'the loss of freight,' " said Lord Truro, in the case of *The Scottish Mar. Ins. Co. v. Turner*, 20 El. & E. 24, "has two meanings, and the distinction between them, and its effects, it is material to bear in mind. Freight may be lost in the sense that, by reason of the perils insured against, the ship has been prevented earning freight—that is not the sense in which it has been lost in this case; or you may use the expression 'loss of freight' in the sense that it may be lost to the owner after it has been earned, by some circumstance unconnected with the contract between the assured and the underwriters on freight.

"For a loss of freight in the first sense, that is, the ship being prevented from earning the freight by the non-performance of the voyage insured, the underwriters on the freight are liable; but for any loss of freight sustained by the owner after it has been earned, I conceive the underwriters are not liable. I can extract no obligation whatever from the policy which should subject them to such a loss. They have performed their warranty by the freight being earned, and they have no concern whatever with who may be entitled to the freight when so earned. In this case, at the time the owners received the freight, they so received it on their own account, for their own benefit, and, as the facts then stood, were entitled to retain it against all the world. The contract between the owners and the underwriters on freight had been entirely performed and the relation between them determined, and

the assured were at that time entitled, not only to retain the freight, but to recover a full compensation for any pecuniary loss they might have incurred by reason of the damage their ship had sustained. But having valued their ship at the sum of £7,500, and the cost of the necessary repairs of the damage being £4,000 only, they preferred to claim a total loss, and to abandon the ship, and thereby obtain £7,500, rather than to claim a partial loss, by which they would be entitled to recover only their actual damage of £4,000, retaining at the same time the ship; and the consequence of their electing to take that course was to make the freight which they had received for their own benefit an item in account between them and the underwriters of the ship; and upon that they found a claim to a total loss of freight against the now appellants. The act of abandonment, if it did not operate as an assignment of the ship, at least inured as a binding agreement to assign it, and thereby invested the underwriters on the ship with all the rights which belonged to them as owners; among which rights, it is said, was that of having the benefit of the earnings of the ship during the voyage; the assignment by abandonment, as I call it, being supposed to entitle the underwriters to all the profits which had arisen throughout the voyage. If the ship had been uninsured, this question could never have arisen.

"But it is said that although if the owners had stood their own insurers, there would have been no loss (of freight), yet by reason of their having thought fit to make a contract of insurance with others, and afterwards to constitute those insurers owners of the ship in their place, the underwriters on the freight have been guilty of a breach of their contract, by not indemnifying the owners for what they call a loss of freight arising out of their having invested the underwriters of the ship with their title to the freight actually earned. I think such a claim is not founded in law or justice."

The Court in this case quotes with approval the language of Alderson, B., in *Benson v. Chapman*, 2 H. L. Cas. 721: "Nor, indeed, is there any instance to be brought in which an action for a total loss of freight has been held to be maintainable where the freight has been actually earned." (See *Lord v. Neptune Ins. Co.* 10 Gray, 121, 122; *Fiedler v. N. Y. Ins. Co.* 6 Duer, 282; *Benson v. Chapman*, 6 Man. & G. 792; 5 Com. B. 330; 2 H. L. Cas. 696.) The French law corresponds in this respect with that of England. (Code de Commerce, art. 386; 1 Pouget Droit Mar. 330; Boulay Paty, 4 Droit Com. 397-417; Meredith's *Emerigon*, ch. 17, § 9, pp. 707-710.)

But *pro rata* or other freight actually earned prior to the abandonment does not pass to the abandonee of the ship. (2 Phillips Ins. § 1738; see also *Miller v. Woodfall*, 8 El. & B. 504.)

Under the American rule embodied in § 146, the abandonee of the ship becomes entitled only to such proportion of the freight as accrued after the casualty that caused the loss. This rule seems to have been first adopted (in opposition to the views of Kent, C. J., who was in favor of adhering to the English rule) in the case of *The United Ins. Co. v. Lenox*, 1 Johns. Cas. 377; 2 id. 443; see also 3 Caines, 251. The rule there laid down has since been adopted in other States, and has become a settled principle of the American law of marine insurance.

The right of the abandonee of the ship under the English law to the pending freight is dependent on the completion by such ship of the voyage by the performance of which freight is to be earned. Hence, if, after the abandonment, the abandoned vessel is unable to complete the voyage, and a substituted vessel, hired for that purpose, carries the cargo to its destination, the freight passes, not to the abandonee of the ship, but to the original owner, on whose account the substituted vessel is presumed to have been engaged. (*Hickie v. Rodocanachi*, 4 Hurl. & N. 455.)

It has been decided in England, that where the insured ship-owner is also the owner of the cargo, an abandonment of the ship does not pass to the abandonee any right to freight, or any compensation in the nature of freight, on the cargo on board at the time of the casualty which caused the loss, if such cargo be removed by the owner at the time of the abandonment, and forwarded by him to its destination.

Thus, in *Miller v. Woodfall*, 8 El. & B. (493) 92 E. C. L., the insured, owner of the ship and cargo, insured the ship, valued at £10,000, to the extent of £10,000; freight, valued at £2,000, to the extent of £2,000. Off Liverpool, her port of destination, the ship suffered serious damage from a storm, and was abandoned to the underwriters. No abandonment of freight was made. After the casualty which caused the loss, the assured, at his own expense, discharged part of the cargo, and carried it to Liverpool. The ship was then towed, with the residue of the cargo, into that port.

In adjusting the loss, a question arose as to whether the abandonees of the ship were entitled to any allowance in the nature of freight on the cargo, which, as already stated, belonged to the ship-owner.

The Court held that nothing in the nature of freight, up to the time of the abandonment, passed to the abandonees of the ship, and that it was quite immaterial that under the designation of freight the ship-owner had insured the increased value of his goods by reason of their transportation from the port of departure to the port of Liverpool.

As to the transportation of the residue of the cargo, after the casualty, on board the abandoned vessel, the Court held that the abandonee was entitled to compensation therefor.

It was conceded that, had the cargo at the time of the casualty belonged to third parties, the abandonment of the ship would have vested in the abandonees the whole freight pending.

Likening the effect of an abandonment to that of a sale, the Court asks whether, if at the moment of the casualty the vessel had been sold to the underwriters, they could have sustained a claim against the owner of the cargo for freight. Concluding that they could not, the Court holds that an abandonment could give them no greater right.

§ 147. *If an insurer refuses to accept a valid abandonment, he is liable as upon an actual total loss, deducting from the amount any proceeds of the thing insured which may have come to the hands of the insured.*

Civ. Code Cal. 2731. N. Y. Civ. Code, 1501.

By § 143 an acceptance of an abandonment is not necessary to the rights of the insured. If the abandonment is valid, the underwriter is bound to the same extent as if he had accepted it. He pays as for a total loss, but is entitled to be credited with the proceeds of any salvage that may have been received by the assured.

§ 148. *If a person insured omits to abandon, he may nevertheless recover his actual loss.*

Civ. Code Cal. 2732. N. Y. Civ. Code, 1502.

ARTICLE IX.

MEASURE OF INDEMNITY.

§ 149. Valuation, when conclusive.

§ 150. Partial loss.

§ 151. Profits.

§ 152. Valuation apportioned.

§ 153. Valuation applied to profits.

§ 154. Estimating loss under an open policy.

§ 155. Arrival of thing damaged.

§ 156. Labor and expenses.

§ 157. General average.

§ 158. Contribution.

§ 159. One-third new for old.

§ 149. *A valuation in a policy of marine insurance is conclusive between the parties thereto in the adjustment of*

either a partial or total loss, if the insured has some interest at risk, and there is no fraud on his part; except that when a thing has been hypothecated by bottomry or respondentia, before its insurance, and without the knowledge of the person actually procuring the insurance, he may show the real value. But a valuation fraudulent in fact entitles the insurer to rescind the contract.

Civ. Code Cal. 2736. N. Y. Civ. Code, 1503.

The common form of printed policy contains this clause:

"The said ship, etc., goods and merchandises, etc., for so much as it concerns the assured, between the assured and the assurers in this policy, are and shall be valued at —."

"The difference between an open and valued policy in point of form is solely this: that in a valued policy, this blank is filled up with the sum at which the parties agree to fix the amount of the insurable interest; in an open policy, it is left in blank.

"The difference in point of effect between a valued and an open policy is, that under an open policy, in case of loss, the assured must prove the actual value of the subject of insurance; under a valued policy he need never do so, except in cases of enormous or fraudulent overvaluation: except in such cases, the valuation in the policy is conclusive, and the case is the same as though the subject of insurance was actually proved to have been worth the sum at which it was valued." 1 Arnold Ins. *303. (See Phoenix Ins. Co. v. McLoon, 100 Mass. 475; Barker v. Janson, Law R. 3 Com. P. 303.)

The insurable interest of the owner of a vessel which has been hypothecated by a bottomry bond is merely the excess of the value of the vessel over the amount of the bond. If a party has purchased a vessel subject to a bottomry lien of which he was ignorant, and has, in good faith and without notice of such lien, insured her for an amount in excess of his actual insurable interest, § 149 provides that he may "show the real value." As the underwriter in such case incurs no risk except in respect

to the excess of the value of the ship over the amount of the bottomry bond, the excess of premium that he has received should be refunded to the assured, or adjusted in a settlement of the loss. (See §§ 95, 152; *Ins. Co. v. Gossler*, 6 Otto, 645; 2 Phill. Ins. § 1249; *Williams v. Smith*, 2 Caines, 13, and the criticism of Mr. Phillips thereon, 2 Phill. Ins. § 1715.)

Mr. Arnould, in the passage already cited, intimates that in cases of enormous or fraudulent overvaluation, the insured may still prove the actual value of the insured interest. But the better opinion seems to be, in accordance with the last clause of § 149, that "a valuation fraudulent in fact entitles the insurer to rescind the contract." (See 2 Parsons Mar. Law, 64, citing *Catron v. Tenn. Ins. Co.* 6 Humph. 176, 185, and other cases; 3 Kent Com. *283, note *a.*)

In the case of *Ionides v. Pender*, Law R. 9 Q. B. 531, independently of any question of fraud in the valuation of the goods insured, it was held that it was properly left to the jury to say whether the valuation in the policy was excessive, and whether it was material for the underwriters to know of the overvaluation. The policy was held void on the ground of concealment of the overvaluation.

Overvaluation is presumptive evidence of fraudulent intent, and the presumption will be strong in proportion to the amount of overvaluation. (*Sturm v. Atlantic Ins. Co.* 63 N. Y. 77.)

In North of England I. S. S. Ins. Co. *v.* Armstrong, Law R. 5 Q. B. 244, insurance was effected for £6,000 on a ship valued in the policy at that sum, though alleged to be actually worth £9,000. She was run down and sunk by collision with another ship. The underwriters paid the loss, and then sued the colliding vessel for damages, and recovered £5,495, this being the limit of the defendant's liability under the English Merchant Shipping Act. The owner of the insured vessel contended that, as this

sum was a compensation for the loss of his vessel, worth £9,000, though estimated at only £6,000 as between him and his underwriters, he was entitled to one-third of it, just as if the vessel had been valued in the policy at \$9,000 and insured for \$6,000, and \$9,000 had been recovered from the defendant. But the Court held that the valuation in the policy was good for all purposes, and that the underwriter was entitled to retain the £5,495.

When there is a loss on a valued policy, and the subject insured is afterwards valued for the purpose of a general average contribution, the liability of the insurer is estimated by the valuation in the policy, and is not limited by the general average valuation. (*Griswold v. Union M. I. Co.* 3 Blatchf. 231.)

§ 150. *A marine insurer is liable upon a partial loss, only for such proportion of the amount insured by him as the loss bears to the value of the whole interest of the insured in the property insured.*

Civ. Code Cal. 2737. N. Y. Civ. Code, 1504.

"The premium or price of the risk being the sole consideration in respect of which the underwriter engages to indemnify the assured against loss, it is plain, on the clearest principles of equity and good sense, that he can only be bound to afford such indemnity to the extent of or in proportion to the sum which he agrees to insure, and upon which the premium is calculated at a certain percentage. Hence it is an elementary principle of insurance law, which, pervading the whole system, cannot be enforced too early nor borne in mind too attentively, that the underwriter pays no loss except with reference to the sum on which he is paid premium: the whole sum, if the loss be total; some aliquot part of the sum, if the loss be partial." (1 Arnould Ins. *7, *8. See also 2 id. *964; 2 Phillips Ins. § 1435.

In fire insurance the insurer pays the entire loss up to the amount insured, but in marine insurance the insurer

only pays such a proportion of the loss as the amount insured bears to the entire value of the insured property. In a valued policy this amount is stated; in an open policy it is ascertained by evidence.

§ 151. *Where profits are separately insured in a contract of marine insurance, the insured is entitled to recover, in case of loss, a proportion of such profits equivalent to the proportion which the value of the property lost bears to the value of the whole.*

Civ. Code Cal. 2738. N. Y. Civ. Code, 1505.

Profits should be and usually are insured at a stated valuation, on account of the difficulty of ascertaining, in the event of a total loss of ship and cargo, the amount of indemnity to which the insured should be entitled.

His loss is measured by the increased value which the goods would have reached had they been transported in safety to the port of destination. But it is impossible to say at what date they would have arrived; and even assuming, as appears to be the rule in the United States, that a loss of the goods implies some loss of profits, there must always be great difficulty in ascertaining the quantum of such loss in the absence of an agreed valuation.

In *Mumford v. Hallett*, 1 Johns. 433, the policy which seems to have been intended as a policy on profits valued at \$2,500, was filled up as follows: At and from Cumana, Spanish Main, to New York, with liberty to touch at Curacoa or St. Thomas, in and with the schooner Rising Sun on profits; then followed the printed words, "on all goods and merchandises laden, or to be laden, etc., the said goods and merchandises, for so much as concerns the assured and assurers in this policy, are and shall be valued at 2,500 dollars," for which amount the policy was underwritten.

The vessel was captured on the voyage described, carried into Bermuda, and libeled in the Vice Admiralty Court, but after a detention there of some weeks, was

restored, and the vessel and cargo arrived soon afterwards at New York. The cargo, which had been insured by other underwriters, was abandoned to them after the seizure and during the detention. The abandonment was accepted, and the cargo, on its arrival at New York, was sold by the underwriters thereon at a considerable profit.

The jury found a verdict for plaintiff for a total loss.

On motion to set aside the verdict, the Court held that the policy was a policy on profits on goods which were valued at \$2,500. As the policy was underwritten for \$2,500, and was a policy on profits, it is remarked by the Court that, "though the profits are not valued, yet every such insurance must, of necessity, be considered as a valued, and not an open, policy; especially if the goods themselves, as is the case here, are valued. If it were otherwise, it would be next to impossible to prove their value, as is done in regard to vessels and cargoes. In these cases it is easy to show what the different subjects cost, but how are you to ascertain what is often imaginary, and must depend on so many contingencies? It does not follow that a profit will be made if the cargo arrives; yet its loss would give a right to recover on such an insurance." The policy seems to have been treated as a policy on profits valued at \$2,500. Judgment was affirmed.

In *Patapsco Ins. Co. v. Coulter*, 3 Peters, 222, it was decided that proof that profits would have been made but for the loss of the cargo is not essential to a recovery on a policy on profits. The Court also held, in conformity with *Loomis v. Shaw*, 2 Johns. Cas. 36, that a loss of cargo on which profits were insured involved a proportionate loss of profits.

An abandonment of profits seems to be ineffectual to transfer any real interest to the underwriter. The profits follow the property, and share its fate. (2 Phill. Ins. § 1503.)

Profits, as such, are not insurable under the French law. (See Code de Commerce, art. 347.)

§ 152. *In case of a valued policy of marine insurance on freightage or cargo, if a part only of the subject is exposed to risk, the valuation applies only in proportion to such part.*

Civ. Code Cal. 2739. N. Y. Civ. Code, 1506.

Thus, if an entire cargo valued at \$100,000 is insured for that amount on a certain vessel in a certain voyage, and only half of the cargo is actually on board the vessel and subjected to the risk, the valuation is considered as reduced one-half. If in such case a total loss of the cargo on board occurs, the assured recovers half the valuation, and receives back half the premium. (See *Forbes v. Aspinall*, 13 East, 327. *Wolcott v. Eagle Ins. Co.* 4 Pick. 429.)

§ 153. *When profits are valued and insured by a contract of marine insurance, a loss of them is conclusively presumed from a loss of the property out of which they were expected to arise, and the valuation fixes their amount.*

Civ. Code Cal. 2740. N. Y. Civ. Code, 1507.

This section is merely the complement of § 151. As a partial loss of the goods on which profits are insured involves a proportionate partial loss of profits, a total loss of the goods involves a total loss of profits, the amount of which is determined by the valuation agreed on in the policy.

§ 154. *In estimating a loss under an open policy of marine insurance, the following rules are to be observed:*

1. *The value of a ship is its value at the beginning of the risk, including all articles or charges which add to its permanent value, or which are necessary to prepare it for the voyage insured;*

2. *The value of cargo is its actual cost to be insured, when laden on board, or where that cost cannot be ascertained, its market value at the time and place of lading,*

adding the charges incurred in purchasing and placing it on board, but without reference to any losses incurred in raising money for its purchase, or to any drawback on its exportation, or to the fluctuations of the market at the port of destination, or to the expenses incurred on the way or on arrival;

3. *The value of freightage is the gross freightage, exclusive of primage, without reference to the cost of earning it; and*

4. *The cost of insurance is in each case to be added to the value thus estimated.*

Civ. Code Cal. 2741. N. Y. Civ. Code, 1508.

Partial loss or particular average on ship.—"The rule," says Mr. Arnould (Ins. vol. 2, p. *978), "for adjusting a particular average on the ship is very simple; viz., that in open policies, the underwriter pays the same aliquot part of the sum he has agreed to insure as the damage or the expense of repairing it is of the ship's value at the commencement of the risk; in valued policies, he pays the same proportion of the valuation in the policy. Thus, suppose in an open policy an underwriter has insured £1,000 on a ship, the insurable worth of which is proved to have been £2,000 at the outset of the risk, but whose value is reduced by the wear and tear of the voyage to only £1,500 at the time of loss, then if a particular average loss takes place amounting to £500, as that sum is one-fourth of £2,000, the ship's insurable value at the outset, the underwriter pays the same proportionable amount, or one-fourth of £1,000, the sum he has insured, namely, £250."

As to the mode of estimating damage on the ship, see § 159.

Partial loss or particular average on cargo.—

It may be questioned whether the adoption of the prime cost of the goods on board as the basis of the adjustment of a partial loss generally furnishes as exact an indemnity to the assured as that which would result from the adoption of the market value. It is obvious that the market

value of goods at a given date may vary greatly from their actual cost when laden on board: the difference representing the gain or loss to the owner according as he may have purchased on a rising or falling market. The prime cost on board, however, is the English standard. (2 Arnould Ins. *964.) The American authorities vary. The true rule would seem to be, to estimate the goods at their value at the commencement of the risk. This is, of course, their market value at that time, without reference to the question of what they may have cost the owner. (See *Coffin v. Newburyport Mar. Ins. Co.* 9 Mass. 436; *Carson v. Mar. Ins. Co.* 2 Wash. 468.) In *LeRoy v. United Ins. Co.* 7 Johns. 343, the prime cost of the cargo was taken as the basis of valuation, on the ground that "in matters of commerce the plainest and simplest rules are always the best." The Court added: "The prime cost is commonly the market price of the article." The propriety, however, of adopting, as in § 154, the market value as there specified, only when the actual cost of the goods laden on board cannot be ascertained, seems to admit of question. The reverse would perhaps be the better rule. (See *Snell v. Delaware Ins. Co.* 4 Dall. 430; 1 Wash. C. C. R. 509; *Carson v. Marine Ins. Co.* 2 Wash. C. C. R. 469.)

Goods are entitled to drawback only on condition that they shall not be relanded in the country from which they are exported. As they cannot legally be relanded there, after having been withdrawn from the government warehouses, the amount of the drawback does not affect their actual market price at the place of exportation. As they could not be sold there without paying duty, their market value, so to speak, is the same as that of other goods of the same class and quality at the same port.

In adjusting, therefore, the amount of damage to such goods in case of a partial loss, the amount of drawback is not deducted from their value. (*Gahn et al. v. Browne*, 1 Johns. Cas. 120; *Minturn et al. v. Columbian Ins. Co.* 10 Johns. 75.)

All expenses paid or incurred in order to place the cargo on board enter into its cost at the place of exportation, and constitute a part of the sum to be paid by the underwriter in the event of a loss. Article 339 of the Code de Commerce contains a similar provision on this head to that contained in subsection 2 of § 154.

The indemnity which it is the object of the policy to secure to the insured is a quantity corresponding (according to the rule which may be adopted) either with the cost of the cargo when placed on board, or its invoice price, or its market value at the beginning of the risk, or its agreed value as stated in the policy. The amount, therefore, which in case of loss the underwriter must pay, does not depend on the "fluctuations of the market at the port of destination, or on expenses incurred on the way, or on arrival." The object of the policy is not to indemnify the merchant for the loss of such profits as he would have made had the goods arrived safely at the port of destination, but to refund to him, in case of loss by a peril insured against, such proportion of what they were worth, or were agreed to be worth, at the beginning of the risk, as the amount covered by the policy may require.

The rule for adjusting a partial loss or particular average on cargo is very clearly stated by Mr. Phillips, (2 Ins. §§ 1459, 1460.) "If the loss is caused by the entire destruction of a portion of the goods, the underwriter pays for them, so far as they are covered by the policy, at the price at which they are insured. If the particular average is occasioned by damage to the goods, whereby their value is diminished, though they remain in quantity, there seems to be but one, and that a very plain, way of estimating the degree of damage. If, in consequence of the damage, the goods sell for only half of what the same goods would have sold for if sound, the direct loss by the damage is fifty per cent., and the insurer must pay, not half of the price of sound goods at that market, but half

of the value at which he insured the goods; and so proportionally in other cases of particular average." (*Lewis v. Rucker*, 2 Burr. 1167; *Johnson v. Shedden*, 2 East, 581; *Usher v. Noble*, 12 id. 639; *Lawrence v. N. Y. Ins. Co.* 3 Johns. Cas. 217.)

The usual mode of ascertaining the extent of loss on damaged goods is by comparing the price realized from auction sales of such goods with the market value of sound goods of the same description.

Particular average on freight.—The insurable interest in freight is understood in England, and generally in the United States, as the gross amount payable according to the bills of lading or charter party. (2 Phillips Ins. § 1238.) It has sometimes been considered that, as the principle of insurance is merely indemnity to the assured, his insurable interest in freight should be restricted to the net proceeds of the freight. *McGregor v. Ins. Co. of Pennsylvania*, 1 Wash. C. C. R. 39. The usage, however, at Lloyd's is otherwise, and the decisions, both English and American, though not entirely approving the rule, are in accordance with it.

In *Stevens v. Columbian Ins. Co.* 3 Caines, 47, Thomson, J., delivering the opinion of the Supreme Court, remarked: "It has frequently, with great propriety, been said, that in matters of commerce the simplest and plainest rules are always best. They are easily learned and easily obtained, and do not depend on any subtleties and niceties. No general rule giving a specific proportion of the freight could, with justice, be adopted. It would operate unequally by reason of the great diversity in the distance and expense of voyages; and to adopt the net amount of freight as the rule would lead to much litigation and uncertainty respecting the deductions to be made. But to take the gross amount of freight as the rule of damages would be equal, simple, and easily ascertained."

In *Palmer et al. v. Blackburn*, 1 Bing. 61, where suit was brought on an open policy to recover for a total loss

of freight, the right to adjust the loss on the gross amount of freight was placed entirely on the ground of general, continuous, and notorious usage, proved by witnesses conversant with the subject of insurance.

"Primage," an item which does not enter into the valuation of freight for the purpose of adjusting a partial loss, is a small payment made to the master, presumably for his own use, for his care and trouble with respect to the goods.

By subdivision 4 of § 154 the cost of insurance is an item which enters into the estimate of the loss on an open policy of insurance. Were it otherwise, the assured, though entitled to recover on his policy, would be obliged to submit to the loss of the premium paid for it. This provision is in accordance with the general usage of the commercial world. (Meredith's Emerigon ch. 9, § 6, p. 225.)

It is obvious, from what has been already stated, that it is not the object of the contract of insurance to place the assured in all respects, in case of a loss by the perils insured against, in the same position as if no loss had occurred, but simply to restore him, as nearly as practicable, to the position which he occupied at the commencement of the adventure. In valued policies, as already remarked, the valuation constitutes the basis on which the loss is adjusted; but this valuation is usually arrived at by calculating the value of the thing insured to the owner at the outset of the adventure, adding the premium and all costs of effecting the insurance. (See 1 Arnould Ins. *11, *302; *Lewis v. Rucker*, 2 Burr. 1171.)

§ 155. *If cargo insured against partial loss arrives at the port of destination in a damaged condition, the loss of the insured is deemed to be the same proportion of the value which the market price at that port, of the thing so damaged, bears to the market price it would have brought if sound.*

Civ. Code Cal. 2742. N. Y. Civ. Code, 1509

See *Lewis v. Rucker*, 2 Burr. 1169; *Lawrence v. N. Y. Ins. Co.* 3 Johns. Cas. 217; *Lamar Ins. Co. v. McGlashen*, 54 Ill. 513; and note to § 154.

This proportion of depreciation is arrived at by comparing the *gross* proceeds of the damaged goods with the *gross* proceeds of similar sound goods. It is evident that the difference in price which a purchaser is willing to pay between sound and sea-damaged goods of the same quality and description, at the same time and place, represents solely the depreciation the latter have sustained by reason of such damage; and this is the basis of the measure of the underwriter's liability. Whatever proportion the market value of the damaged goods bears to the market value of the sound goods, the underwriter pays the assured the same proportion of the ascertained or agreed value of the goods at the port of departure.

By adopting this rule, the amount paid by the underwriter represents the actual sea damage sustained by the goods, and not any depreciation in their value attributable to any other cause; so that whether the goods come to a rising or falling market, the amount to be paid by the underwriter is the same. Thus, suppose a cargo worth or valued at \$5,000 arrives at a rising market, having sustained damage to the extent of one-half by the perils insured against. The goods, if sound, would have brought, say \$7,500. Being damaged fifty per cent., they bring only \$3,750; whereby the owner receives \$3,750 less than if the goods had arrived sound. The underwriter, however, does not pay this amount, but only such proportion of the value as \$3,750 bears to \$7,500; that is, one-half, or \$2,500.

But suppose the goods arrive at a falling market. If sound, they would have brought, say \$2,500; being damaged fifty per cent., they bring \$1,250; whereby the owner receives \$1,250 less than if they had arrived sound. But \$1,250 is one-half of \$2,500, consequently the assured, as before, receives one-half of \$5,000, or \$2,500. (See *Johnson v. Shedden*, 2 East, 581; 2 Arnould Ins. *968.)

The same rule of adjustment is recognized in the French law of marine insurance. (1 Pouget Droit Mar. 280.)

Mr. Dixon, in his work on Average, p. 257, remarks, that, with respect to goods which it is customary to sell by private contract, a public sale would not show the real value, because such sale may be supposed in general to be less advantageous than the other. For this reason, as also because the assured cannot be obliged to sell that part of his goods for which there is no claim merely to ascertain the value of the damaged, the underwriters have no right to insist upon a sale of the undamaged, part.

§ 156. *A marine insurer is liable for all the expense attendant upon a loss which forces the ship into port to be repaired; and where it is agreed that the insured may labor for the recovery of the property, the insurer is liable for the expense incurred thereby, such expense, in either case, being in addition to a total loss, if that afterwards occurs.*

Civ. Code Cal. 2743. N. Y. Civ. Code, 1510.

In *Alexander et al. v. Sun Mutual Ins. Co.* 51 N. Y. 253, the defendant had insured plaintiff's brig, valued at \$10,000, in the sum of \$8,000, by a time policy extending to July 11th, 1865, containing the usual suing and laboring clause authorizing the assured to "sue, labor, and travel in and about the defense, safeguard, and recovery of the said vessel without prejudice to the insurance made by said policy."

The brig sailed from Balize, Honduras, on the 29th of August, 1864, and within the next three days was driven ashore, but got off in a damaged condition and leaking badly. She returned to Balize, discharged her cargo there, which was forwarded by other vessels, and was found on examination to require extensive repairs. By these proceedings, certain expenses were incurred in the nature of general average, of which the brig's share was

\$581.18. The brig was then temporarily repaired at Balize, at an expense of \$8,769.74, and proceeded to New York, where she was repaired in full, at an additional expense of \$4,547.71.

The plaintiff claimed eight-tenths of the sum of these three items; that is to say, eight-tenths of \$13,898.13, being \$11,118.48, for which latter sum they brought suit. The defendant then paid \$8,000, the amount insured by it, leaving the question of its liability for the additional \$3,118.48 to be disposed of by the Court.

The Commission of Appeals held that the suing and laboring clause in question referred to charges not covered by the insurance, and did not embrace losses caused by damage to the property insured. That its object was to secure diligence in the preservation and protection of the property insured, and thereby prevent a loss or reduce its amount, and to provide compensation for the labor done and expenses incurred in accomplishing that end. That in the case in question the expenses at Balize were made to repair damages caused by the risks insured against, which were clearly payable under the insuring clause. That these expenses were not incurred in the "defense, safeguard, or recovery" of the vessel. There was no impending disaster against which they formed a protection. The Court held that the defendant was only liable over and above the amount insured, \$8,000, to the general average charge of \$581.18.

The insurer on the ship is not liable for any expense incurred specifically and exclusively for the benefit of the cargo, nor for any sum per diem agreed by the owner to be allowed the master while in port.

Where expenses are incurred under the suing and laboring clause for the recovery of the ship, the insured may recover the whole amount against the insurer on the ship, though the cargo and freight should be incidentally benefited, and ought to contribute in proportion; leaving the insurer on the ship to recover, if he can, of the own-

ers or insurers of freight and cargo, their contributory shares. (See § 158.) (*Watson v. Marine Ins. Co.* 7 Johns. 57; *Magrath v. Church*, 1 Caines. 216.)

The rule that the insured may in such case recover, in the first instance, of the insurers on the vessel the whole loss he has sustained, does not apply where the ship, freight, and cargo belong to the same person, and the freight and cargo are not insured. Thus where expenses incurred in consequence of a capture were for the joint benefit of ship, freight, and cargo, all owned by the same person, the two latter interests being uninsured, it was held that the assured on the ship was not entitled to recover from the underwriter more than that proportion of the average which was to be borne by the ship. (*Jumel v. Marine Ins. Co.* 7 Johns. 413. See *Potter v. Providence Washington Ins. Co.* 4 Mason, 298; *Saltus v. Ocean Ins. Co.* 14 Johns. 137; *Pezant v. National Ins. Co.* 15 Wend. 453.)

Under the suing and laboring clause in the policy, the insurers are liable for a proportion of any reasonable expenses incurred in preserving the subject from the operation of the perils insured against. (*Kidston v. Empire Ins. Co.* Law R. 1 C. P. 535; 2 id. 357; *Lohre v. Aitchison*, Law R. 3 Q. B. D. 558.) But they are not liable for expenses of the examination by appraisers for the purpose of ascertaining the amount of the loss, nor for the expenses of refitting the merchandise for market. (*Cory v. Boylston Ins. Co.* 107 Mass. 140.)

In *Matheson v. Equitable Marine Ins. Co.* 118 Mass. 209, it was held that, by the general law of marine insurance, independently of local usage or any particular clause in the policy, if a partial loss to an insured vessel is repaired, and a total loss afterwards happens during the term of the policy, the insurer is liable for the amount of both losses, although it exceeds the amount named in the policy. The opinion of the court in this case, delivered by Gray, C. J., after citing numerous authorities in support of the rule as laid down by the Court, proceeds as

follows: "A rule recognized so long and so often, by such a weight of authority, and not contradicted or doubted by any judge in England or America for sixty years, is too firmly established to be shaken by the *obiter dicta* in the very recent case of *Lidgett v. Secretan*, Law R. 6 Com. P. 616; the still later decision of the Commission of Appeals in *Alexandre v. Sun Mutual Ins. Co.* 51 N. Y. 253, or the doubts expressed in 2 Phill. Ins. (4th ed.) § 1743. See also § 1267. . . . The ground of our decision is that, by the general law of marine insurance, independently of any particular clause or local usage, the partial losses having been repaired before the total loss happened, and the latter as well as the former having occurred within the term of the policy, the underwriters were liable for both." This rule seems to be in accordance with the law of France. (Code de Commerce, art. 393, and note by Rogron, 1 Pouget Droit Mar. 264, 266. See also *Wood v. Lincoln & K. Ins. Co.* 6 Mass. 479.)

In *Meyer v. Ralli*, L. R. 1 C. P. D. 358, it was held that where property is insured free of particular average, a recovery under the suing and laboring clause must be confined to such expenses as are necessary to avert a total loss, for which alone the insurer would be liable.

In *Lidgett v. Secretan*, Law R. 6 Com. P. 616, the plaintiffs insured, for £18,000, their iron ship *Charlemagne*, valued at £20,000, at and from London to Calcutta, and for thirty days after arrival; and in another policy for £10,000, at and from Calcutta to London. The defendant underwrote each of the policies, the first for £150, the second for £100.

The *Charlemagne*, injured on the voyage by sea perils, and having jettisoned part of her cargo, arrived at Calcutta on the 28th of October, and the unloading of her outward cargo was completed by the 8th of November. While she was undergoing repairs, the outward policy expired, and on the 5th of December the vessel was totally destroyed by fire.

The Court held that under the first policy the assured were entitled to recover the amount of the vessel's depreciation at the expiration of the risk in consequence of the damage she had sustained on the outward voyage, without reference to the sum actually expended on her repairs; and that under the second policy they were entitled to recover as for a total loss, without reference to their claim under the first policy.

In *Lohre v. Aitchinson*, L. R. 3 Q. B. D. 558, the defendant insured plaintiff for £1,200 on a ship valued at £2,600. The policy contained the suing and laboring clause. The ship suffered sea damage and incurred salvage expenses to the amount of £515. The damage was repaired at an expense, deducting one-third new for old, of £3,178. It was conceded that these repairs "were reasonably necessary in order to make the ship staunch, strong, and seaworthy." The value of the ship after these repairs was £7,000. The question that arose was in respect to the mode in which the loss was to be adjusted. The Court says: "When the amount of the ascertained loss by repairs is less than the value of the ship at the commencement of the risk, or (which is equivalent to) the value of the ship stated in the policy, the relation is expressed in business by a percentage expression; as that the loss is 20 per cent., or 50 per cent., or 90 per cent. Then the underwriter is said to be liable to pay the same percentage of the sum insured.

According to the rule, therefore, if the percentage of the loss is 99 per cent. of the original value of the ship, the underwriter must pay 99 per cent. of the sum insured. This, by the argument adduced to us, was admitted; but it was urged that the rule cannot be applied, because it is wholly unjust to apply it, if the relation of the amount of loss to the original value of the ship is 100 per cent., or greater than 100 per cent.; and in order to replace the rejected rule, many new ones were suggested. But if the rule were the only rule, the only logical conclusion

would be, that if the first relation is 100 per cent., or more than 100 per cent., so must the second relation be, and the underwriter must pay accordingly, 100 per cent., or more than 100 per cent., of the sum insured. There is, however, another, and to a certain extent controlling, rule: "The liability of insurers on a single loss is, without question, limited to the amount insured (and the expense of suing, etc.), and the payment of the whole amount for a single loss discharges them from the further liability." (Phillips Ins. § 1743.) Where the relation of the ascertained loss to the value of the ship at the commencement of the risk, or to the value stated in the policy, is greater than 100 per cent., the underwriter, who by the rule for adjustment would have to pay more than 100 per cent., is by the rule of limitation of liability absolved from paying more than 100 per cent., but there is nothing to prevent his liability to the extent of 100 per cent. The defendant, therefore, here was bound to pay, in respect of the loss arising from the ascertained expense of repairs, £1,200, the whole sum insured, although the loss was, according to the phraseology of insurance law, only a partial, as distinguished from a total, loss under the policy.

In respect to the liability of the underwriter to pay his proportion of the £515 salvage expenses, under the suing and laboring clause, the Court remarked: "The general construction of the clause has been held to be, and we think is, that if by perils insured against, the subject-matter of insurance is brought into such danger, that without unusual or extraordinary labor or expense a loss will very probably fall on the underwriters, and if the assured, or his agents or servants, exert unusual or extraordinary labor, or if the assured is made liable to unusual or extraordinary expense, in or for efforts to avert a loss, which, if it occurs, will fall on the underwriters, then each underwriter will, whether in the result there is a total or a partial loss, or no loss at all, not as part of

the sum insured, but as a contribution independent of, and even in addition to, the whole sum insured, pay a sum bearing the same proportion to the cost or expense incurred as the sum they would have had to pay if the probable loss had occurred (or to the loss which, because the efforts have failed, has occurred), as that loss bears to the sum insured. "There is a question," says Welles, J., in *Kidston v. Empire Marine Ins. Association* (Law R. 1 Com. P. 542; 2 Com. P. 357), "whether the clause ought to be limited in construction to a case where the assured abandons, or may perchance abandon, so that the expense incurred is not only in respect of a subject-matter in which the underwriters are interested, but upon property which by the abandonment actually becomes or may become theirs; or whether it extends to every case in which the subject of insurance is exposed to loss or damage for the consequences of which the underwriter would be liable, and in warding off which labor is expended. The question manifestly depends upon the construction of the clause; and quite apart from the proved usage, we think the latter is the construction."

The defendant was accordingly adjudged to pay, in addition to the £1,200, such proportion of £515 salvage expenses as £1,200 bears to £2,600, or $\frac{12}{26}$ of £515. This case was finally carried to the House of Lords, and it was there held that, under the suing and laboring clause, the insured was not entitled to recover the amount of compensation awarded by a Court of Admiralty to salvors, who were not employed by the assured, and who claimed salvage, not by virtue of any contract, but by the principles of the law maritime. The service rendered by such salvors was not regarded by the Court as having been performed directly or indirectly by the assured. (Law R. 4 App. Cas. 755.) This decision also overrules that pronounced in *Dixon v. Whitworth*, L. R. 4 C. P. D. 371.

By article 381 of the Code de Commerce, in case of shipwreck, or stranding with breakage (*échouement avec*

bris), the assured ought, without prejudice to the abandonment, to labor in recovering the wrecked property. On his affirmation, the expenses of such recovery are allowed him, to the extent of the value of the property recovered.

“The expense attendant upon a loss which forces the ship into port to be repaired” (§ 156), in order that she may be enabled to pursue her voyage, usually constitutes the subject of a general average contribution, in which case the underwriter is liable to pay such proportion of the amount of the average contribution chargeable on the insured interest as may be required by the conditions of the policy. (See note to § 157.)

If before a partial loss is repaired it is succeeded, during the term of the policy, by a total loss, the underwriter is liable for the amount of the total loss only, and this affords the insured a complete indemnity, within the meaning of that term as understood in the law of marine insurance. (*Lidgett v. Secretan*, Law R. 6 Com. P. 616; *Livie v. Janson*, 12 East, 648; *Stewart v. Steele*, 5 Scott N. R. 927; *Matheson v. Equitable Ins. Co.* 118 Mass. 211.)

§ 157. *A marine insurer is liable for a loss falling upon the insured, through a contribution in respect to the thing insured, required to be made by him towards a general average loss called for by a peril insured against.*

Civ. Code Cal. 2744. N. Y. Civ. Code, 1511.

When the interest insured is liable to a contribution in general average, the amount of such contribution is not necessarily the measure of the underwriter's liability; for while the value of the ship and cargo for the purposes of the policy is either that which has been agreed on by the parties, or that stated in § 154, their value for the purposes of contribution in general average depends upon the time and place, and the circumstances under which a separation of the different interests is effected and the adventure finally closed. (*Barnard v. Adams*, 10 How. 307.)

Suppose goods to be worth at the port of departure, or to be valued in the policy and insured at \$10,000—their net value at the port of discharge to be \$20,000, and the contribution to be paid by them, in a general average adjustment, to be \$2,000, or $\frac{1}{10}$ of this value. This sum must be paid by the assured; but he should receive on account of it from the underwriter \$1,000 only, or one-tenth of the actual or agreed value of the goods at the time of the beginning of the adventure. The assured is therefore his own insurer for the difference between these two percentages. (See 2 Arnould Ins. *950, *951; Meredith's Emerigon, ch. 12, § 44, p. 508.)

The assured who has suffered loss from a sacrifice which creates a general average lien may always in the first instance demand payment of the underwriter, and leave the latter to enforce the general average lien on the contributory interests. (2 Phill. Ins. § 1348; Dickenson v. Jardine, Law R. 3 Com. P. 639. See next section of this code.)

Under the old maritime law of Europe the rule was otherwise. (See Meredith's Emerigon, 509.)

In New York, according to Mr. Phillips, under a valued policy in which the whole value as fixed in the policy is insured, the underwriters contribute the whole amount assessed upon the subject in general average, whether it contributes on a value greater or less than that at which it is fixed in the policy, and so proportionally, if one-half, one-quarter, or any other proportion of the value is insured. (2 Phill. Ins. § 1410.)

Mr. Parsons lays down the rule that "insurers pay to the insured what they, as owners of the property, pay by way of contribution for the safety of their goods." (2 Mar. Insurance, 289.)

Where goods insured by a valued policy are jettisoned for the common benefit, the underwriters are liable for the amount at which the goods are valued in the policy, though it may exceed their market value at the port of

destination. (*Forbes v. Manufacturers' Ins. Co.* 1 Gray, 371.)

§ 158. *Where a person insured by a contract of marine insurance has a demand against others for contribution, he may claim the whole loss from the insurer, subrogating him to his own right to contribution. But no such claim can be made upon the insurer after the separation of the interests liable to contribution, nor when the insured, having the right and opportunity to enforce contribution from others, has neglected or waived the exercise of that right.*

Civ. Code Cal. 2745. N. Y. Civ. Code, 1512.

Jumel v. Marine Ins. Co. 7 Johns. 412; *Maggrath v. Church*, 1 Caines, 196; *Hanse v. N. O. F. & M. Ins. Co.* 5 La. 379; 10 O. S. 1.

"Where goods insured have been thrown overboard for the general benefit, it would seem that the owner of the goods ought, in the first place, to claim the accustomed contribution, and resort to the underwriters only for the residue, which is, in fact, the true amount of the loss. If, however, this contribution should, from whatever cause, remain unpaid after the voyage is ended, Pothier (h. t. u. 52, 165) holds that the underwriters will be liable for the whole value of the jettison; and they will have a right to sue for contribution in the name of the assured. But though I admit this to be good law in England, I cannot, generally speaking, approve of a practice which makes an abandonment necessary in a case where there can only be a partial loss. And yet cases might occur in which such a proceeding would be perfectly proper." (*Shee's Marshall on Insurance* (5th ed.), 435.) See preceding note.

As the loss sustained by the jettison is partly compensated by contribution in general average, the loss, in one sense of the term, is not total. This argument was urged, on behalf of the underwriter, in the case of *Dickenson v. Jardine*, Law R. 3 Com. P. 639. In this case 607 out of 645 packages of tea, insured on a voyage from Foochow

to London, were properly jettisoned in getting the vessel off a reef on which she had struck. The insurable value of the 607 packages was £3,776 6s. The net value of the same at the port of destination would have been £3,305 0s. 2d. The general average adjustment gave the assured a right of contribution for £3,776 6s., less £995 12s. 2d., the proportion due by the assured. The underwriter paid £995 12s. 2d., and the assured brought suit for the difference, being £2,780 13s. 10d.

Welles, J., in the course of his opinion, remarks as follows: "The goods were totally lost at the time, though their owner had a contingent right to recover from certain persons a portion of their value. The result is, that the owner has two remedies: one for the whole value of the goods against the underwriters, the other for a contribution in case the vessel arrives safely in port; and he may avail himself of which he pleases, though he cannot retain the proceeds of both, so as to be repaid the value of his loss twice over. This is the usual case where there is an insurance, and a loss following thereupon within its terms which would be total but for the liability of a third person."

The same rule exists in the French law. (Pouget Droit Mar. vol. 1, § 177, p. 275.)

Where the assured elects to claim the whole loss from the underwriter, he must do so in season to enable the latter to exercise the right of subrogation effectually. He must not delay making his claim against the underwriter until the lien on the interests liable to contribution in general average has been lost, and no effectual security substituted in its place, or until change of circumstances has rendered his right to contribution of no avail. Such delay will deprive him of his right to indemnity from the underwriter. (2 Phill. Ins. § 1351.)

The proper place for an adjustment of general average is usually the port of destination, or the place at which the adventure is terminated, and a separation effected

of the interests liable to contribution. (*McLoon v. Cummings*, 73 Pa. St. 98.)

§ 159. *In the case of a partial loss of a ship or its equipments, the old materials are to be applied towards payment for the new ; and whether the ship is new or old, a marine insurer is liable for only two-thirds of the remaining cost of the repairs, except that he must pay for anchors and cannon in full, and for sheathing metal at a depreciation of only two and one-half per cent. for each month that it has been fastened to the ship.*

Civ. Code Cal. 2746. N. Y. Civ. Code, 1513.

Section 159 expresses the rule as generally understood and adopted in the United States. (3 Kent Com. *339; 2 Phill. Ins. §§ 1431-1434; 2 Parsons Mar. Law, 434.) The exception stated in respect to anchors seems to exist in England and on the continent of Europe. (Phillips' Stevens & Benecke on Average, 386; Hopkins on Average, 147; 2 Parsons Mar. Law, 436; Hopkins Mar. Ins. 412.) The qualified exception as to sheathing metal is frequently provided for by stipulation in the policy. (2 Phill. Ins. § 1431; 2 Arnould Ins. *984.) In England the usage is to allow a deduction of one-sixth new for old, on iron chains. (Hopkins on Average, 147.)

The old materials belonging to the ship-owner are to be applied as far as practicable towards repairing the loss, and the underwriter is liable for two-thirds of the expense after crediting the ship-owner with the value of the old materials. (3 Kent Com. *339; *Brooks v. Oriental Ins. Co.* 7 Pick. 259; *Eager v. Atlas Ins. Co.* 14 id. 143.)

Thus, if a ship fully insured sustains a loss which it will require \$9,000 to repair, and old material worth \$3,000 is used for that purpose, the expense is reduced to \$6,000, and for two-thirds of this sum, or \$4,000, the underwriter is responsible. The practice in England is to deduct the value of the old materials from the net expense of the repairs, after having deducted the customary one-third. The third

is deducted, not from the expense of materials alone, but from that of labor and materials. (2 McLachlan's *Arnould's Ins.* 840; *Hopkins Marine Ins.* 190.)

Mr. Dixon remarks (*Average*, p. 222) that the Boston policies require a deduction of one-third from the labor and materials; in New York, Philadelphia, and probably most other ports in the United States, they provide for a deduction of one-third from the cost of repairing the ship. He also states, that under the Philadelphia policies, the one-third is first deducted, and from the remainder is taken the value of the old materials.

The deduction of one-third new for old is made as well from the cost of temporary repairs at the port of necessity, including the necessary expenses of raising money therefor, as from the cost of permanent repairs. Such, at least, appears to be the American rule. (*Paddock v. Com. Ins. Co.* 104 Mass. 535, citing *Brooks v. Oriental Ins. Co.* 7 Pick. 259; *Orrok v. Com. Ins. Co.* 21 Pick. 456; *Lincoln v. Hope Ins. Co.* 8 Gray, 22, 26. But see 2 Phill. § 1433, citing *Depau v. Ocean Ins. Co.* 5 Cowen, 63.) In England, according to Mr. Hopkins (*Average*, 149), it is held that the deduction is not to be made from the cost of temporary repairs, because, having to be removed afterwards, they add nothing to the permanent value of the ship. As the reason for making the deduction is the benefit derived by the owner from the substitution of new material for old, the rule does not apply where, without fault on the part of the owner, the vessel, after being repaired, does not come into his possession. (*Da Costa v. Newnham*, 2 Term Rep. 407.)

In *Plummer v. Wildman*, 3 Maule & S. 482, Mr. Justice Bayley expressed the opinion that if the repairs were merely such as were necessary to enable the ship to prosecute her voyage home, and are afterwards of no benefit to the ship, such repairs would properly come under a general average. Mr. Benecke (*Phillips' Stevens & Benecke on Average*, 123) questions this dictum. (But

see *Padelford v. Boardman*, 4 Mass. 548; *Brooks v. Oriental Ins. Co.* 7 Pick. 259.)

The authorities do not agree in respect to what items are to be included in the "cost of repairs" from which the deduction is to be made. The labor employed in making the repairs necessarily enters into the cost of the repairs, though by the law of some European states, which differs in this respect from that of England and the United States, the deduction is made only from the value of the materials. (Phillips' *Stevens & Benecke on Average*, 385, 386.)

It is stated by Mr. Hopkins (*Average*, p. 151) that there are some parts and stores of a ship for which, conventionally, the English underwriters hold themselves not liable, either because they are in a notoriously insecure position, although the customary one, or because the loss of them comes under the denomination of "wear and tear." Thus, the stern boat, hanging in davits, is never allowed by them, nor are casks on deck, save a water or harness cask, lashed or secured by hoops to its place; or warps and ropes coiled on deck, except, in the latter instance, if the vessel had just left port or was on the point of entering it, and so required to have the ropes ready for use.

If such losses are properly referable to the head of "wear and tear," the underwriters of course have nothing to do with them. But where one of the ship's boats, occupying its customary position, is swept away by a peril of the seas, the underwriter would seem to be liable, unless exempted by some exception inserted in the policy or created by well-established usage. In *Hall v. Ocean Ins. Co.* 21 Pick. 483, the Court said: "If the boat was improperly carried or slung at the stern davits, the underwriters are not to be charged with the loss of it. But the burden would be upon the defendants to show a good reason why they should not pay for the loss or damage of anything which is *prima facie* included and covered by

the policy." (See *Brooks v. Oriental Ins. Co.* 7 Pick. 258, 269.)

Charges directly incidental to the repairs, such as interest on moneys borrowed at a port of distress to pay for the repairs, commissions paid to an agent for making the advance, and whatever else enters directly into the amount necessary to defray the expenses of the repairs, is deemed a part of the cost of the repairs, and is subject to a deduction of one-third. (*Orrok v. Commonwealth Ins. Co.* 21 Pick. 456.)

"Certain expenses, however," says Mr. Hopkins (*Average*, 147), speaking of the usage in England, "are excepted from reduction, though it is not very clear upon what grounds. Such are hire of the shipwright's dock and ways; use of shears, stage, and other utensils; laborers' wages, docking and undocking vessel, and clearing away rubbish; boat hire, and a few other small expenses. These are looked upon as necessary to the effecting of the repairs, yet not increasing the value of the materials used." (See *Potter v. Ocean Ins. Co.* 3 Sum. 38; *Orrok v. Commonwealth Ins. Co.* 21 Pick. 456.)

Where goods are necessarily sold in a port of distress to pay for repairs to the ship, one-third is to be deducted from the cost of the repairs, but not, it would seem, from the difference between the proceeds of the goods sold and what they would have sold for in the port of destination. (*Depau v. Ocean Ins. Co.* 5 Cowen, 63.)

Where funds have been justifiably raised on bottomry to repair a partial loss, the underwriters are not bound to protect the ship against the bottomry bond, but to bear their share of the increased expenses of thus raising the money. (*Bradlie v. Maryland Ins. Co.* 12 Peters, 405.) But it seems that where expenses are incurred for repairs in a foreign port by express direction of the underwriters, for which, with their knowledge and tacit assent, a bottomry bond is given, and they refuse to pay it on the arrival of the ship, which is thereupon sold to satisfy the debt,

the underwriters are liable to the owner for all the damage that occurs in consequence of their refusal. (*Da Costa v. Newnham*, 1 Term Rep. 407.)

CHAPTER III.

FIRE INSURANCE.

- § 160. Alteration increasing risk.
- § 161. Alteration not increasing risk.
- § 162. Acts of the insured.
- § 163. Measure of indemnity.

§ 160. *An alteration in the use or condition of a thing insured from that to which it is limited by the policy, made without the consent of the insurer, by means within the control of the insured, and increasing the risk, entitles an insurer to rescind a contract of fire insurance.*

Civ. Code Cal. 2753. N. Y. Civ. Code, 1515.

For illustrations of the rule see the following cases:

Curry v. Commonwealth Ins. Co. 10 Pick. 535; *Merriam v. Middlesex M. F. Ins. Co.* 21 id. 162; *Murdock v. Chango Ins. Co.* 2 Comst. 210; *Gardiner v. Piscataquis M. F. Ins. Co.* 38 Me. 439; *Washington Co. M. Ins. Co. v. Merchants' and Manufacturers' M. Ins. Co.* 5 Ohio St. 450; *Dodge Co. Mut. Ins. Co. v. Rogers*, 12 Wis. 337; *Appleby v. Fireman's Fund Ins. Co.* 45 Barb. 454; *Appleby v. Astor F. Ins. Co.* 54 N. Y. 253; *Kern v. South St. Louis M. I. Co.* 40 Mo. 19; *Howell v. Baltimore Eq. Soc.* 16 Md. 377.

Fire policies usually contain a warranty against the use of the premises for certain specified purposes, and in this case a breach of the warranty will either avoid the policy or suspend its operation during the continuance of the breach of the warranty, as the terms of the policy may prescribe. In *Mead v. North Western Ins. Co.* 7 N. Y. 533, the policy provided that, in case the premises insured should at any time after the making and during the continuance thereof be appropriated, applied, or

used to or for the purpose of carrying on or exercising therein any trade, business, or vocation denominated hazardous or extra hazardous, or specified in the memorandum of special rates in the proposals annexed to the policy, or for the purpose of storing therein any of the articles, goods, or merchandise in the same proposals denominated hazardous or extra hazardous, or included in the memorandum of special rates, unless otherwise therein specially provided for, or thereafter agreed to by the company in writing, to be added to or indorsed upon the policy, then and from thenceforth, *so long as the same should be so appropriated, applied, or used*, the policy should cease and be of no force or effect.

When a policy contains a clause of this description, it becomes unnecessary to inquire, in case of a breach of any of such conditions as are above set forth, whether such breach increased the risk or not, as the consequence declared by the policy ensues on the breach, without regard to its effect on the increase of risk. (*Appleby v. Astor F. Ins. Co.* 45 Barb. 454; 54 N. Y. 253; *Lee v. Howard Fire Ins. Co.* 3 Gray, 583; *Macomber v. Howard F. Ins. Co.* 7 id. 257; *Westfall v. Hudson River F. Ins. Co.* 12 N. Y. 289.)

But a condition in a policy on a building, which prohibits its being appropriated, applied, or used for the purpose of storing or keeping therein certain articles denominated as hazardous, is not violated by a mere temporary or casual deposit of such articles in the building. (*Hynds v. Schenectady C. M. Ins. Co.* 16 Barb. 119, affirmed 1 Kern. 554; *Shaw v. Robberds*, 6 Ad. & E. 75; *Dobson v. Sotheby*, 1 Moody & M. 90; *O'Neill v. Buffalo F. I. Co.* 3 Comst. 122; *Williams v. New England M. F. Ins. Co.* 31 Me. 219; *Gates v. Madison Co. M. I. Co.* 1 Seld. 469; *Williams v. Firemen's Fund Ins. Co.* 54 N. Y. 569.)

But if the policy provides that the insurer shall not be liable for a loss caused by the use of a certain article—e. g., kerosene—no loss caused by its use, even on a single

occasion, can be recovered. (*Watson v. Farm Buildings Ins. Co.* 73 N. Y. 310. See the valuable editorial note to *Collins v. Farmville Ins. Co.* 8 Ins. Law J. 487, on storing and keeping hazardous articles.)

The effect of a breach of warranty, whether relating to an increase of risk or to any other subject (unless the policy provides otherwise), is to avoid the policy. (*Westfall v. Hudson River F. I. Co.* 2 Duer, 490; 12 N. Y. 294; *Mead v. Northwestern Ins. Co.* 7 id. 530; *Lounsberry v. Protection Ins. Co.* 8 Conn. 459; *Phoenix Ins. Co. v. Lawrence*, 4 Met. (Ky.) 9; *Obermeyer v. Globe Ins. Co.* 43 Mo. 573; *New England F. I. Co. v. Schettler*, 38 Ill. 166; *Deitz v. Mound City M. F. Ins. Co.* 38 Mo. 85.)

§ 161. *An alteration in the use or condition of a thing insured from that to which it is limited by the policy, which does not increase the risk, does not affect a contract of fire insurance.*

Civ. Code Cal. 2754. N. Y. Civ. Code, 1516.

But if the insured property is "limited" to a particular use or condition by a promissory warranty, or if the policy contains a clause declaring that if the property be put to any other than the designated use, or if its condition be changed, the policy shall be suspended, or shall become void; that result will of course follow. (*Kelly v. Worcester Ins. Co.* 97 Mass. 284; *Lee v. Howard Ins. Co.* 3 Gray, 583; *Wetherill v. City F. Ins. Co.* 16 id. 276; *Mead v. Northwestern Ins. Co.* 7 N. Y. 533; *Deweese v. Manhattan Ins. Co.* 35 N. J. 366; *Gasner v. Metropolitan Ins. Co.* 13 Minn. 483.)

If the alteration be to a less hazardous use or condition than that permitted by the terms of the policy, the change will not ordinarily avoid the policy. (*Reynolds v. Com. Ins. Co.* 47 N. Y. 597; *Catlin v. Springfield F. Ins. Co.* 1 Sum. 434, 440; *State Mutual F. Ins. Co. v. Arthur*, 30 Penn. 315; *Lyman v. State Mutual F. Ins. Co.* 14 Allen, 329.)

Whether, where certain risks are enumerated in the policy, and therein designated as hazardous, a change in the use or condition of the premises from a "hazardous" use or condition of one description to a "hazardous" use or condition of another description, but belonging to the same class of "hazardous" risks, will avoid the policy, if the risk in fact be not increased by such change, is a question not entirely settled by the authorities. (See cases last cited; also *Smith v. Mechanics' and Traders' Ins. Co.* 32 N. Y. 399, 402, doubted in *Matthews v. Queen City Ins. Co.* 2 Cin. (Ohio) 109; *Wood v. Hartford F. I. Co.* 13 Conn. 533; *Rafferty v. New Brunswick F. I. Co.* 3 Har. (N. J.) 480; *Lee v. Howard F. I. Co.* 3 Gray, 592.)

§ 162. *A contract of fire insurance is not affected by any act of the insured, subsequent to the execution of the policy, which does not violate its provisions, even though it increases the risk and is the cause of a loss.*

Civ. Code Cal. 2755. N. Y. Civ. Code, 1517.

The proposition contained in this section, if correct in the abstract, is of very little practical importance, inasmuch as modern fire policies are usually so drawn as to render the policy void if the insured increases the risk. Some of them, indeed, provide simply that in case the risk be increased the policy shall be void. (*Shepard v. Union Ins. Co.* 38 N. H. 232; *Parker v. Arctic F. Ins. Co.* 59 N. Y. 1; *Merriam v. Middlesex Ins. Co.* 21 Pick. 162; *Schmidt v. Peoria M. & F. I. Co.* 41 Ill. 296; *Peterson v. Miss. Valley Ins. Co.* 24 Iowa, 494.)

§ 163. *If there is no valuation in the policy, the measure of indemnity in an insurance against fire is the expense, at the time that the loss is payable, of replacing the thing lost or injured in the condition in which it was at the time of the injury; but the effect of a valuation in a policy of fire insurance is the same as in a policy of marine insurance.*

Civ. Code Cal. 2756. N. Y. Civ. Code, 1518.

In a valued policy the thing insured is stated to be valued at or worth a designated sum (*Harris v. Eagle Ins. Co.* 5 Johns. 368; *Cushman v. Northwestern Ins. Co.* 34 Me. 487; *Franco v. Natusch*, 6 Tyrw. & G. 401; *Luce v. Dorchester M. I. Co.* 105 Mass. 297), or some equivalent expression is used, indicating that the parties have agreed that such sum shall, for the purposes of insurance, be deemed its value. A valued policy values the utmost possible amount of the loss. It is equivalent to an assessment of damages in case of a total destruction of the valued property. (*Lycoming Ins. Co. v. Mitchell*, 48 Pa. St. 367.) The clause in a valued policy regulating the amount payable by the insurer is commonly in substance as follows: "If a total loss happens, these underwriters shall not pay more than the amount of the valuation, and if there be a partial loss, the valuation regulates the amount of the average contribution." (*Griswold's Fire Underwriter's Text-book*, 284.) While in marine insurance a loss is not actually total unless the entire property insured is lost, the expression "a total loss," in the phraseology of fire insurance, is commonly used to indicate a loss equal to or in excess of the amount of insurance; thus, if a building worth \$20,000 be insured for \$5,000 in a fire policy, a loss to the amount of \$5,000 or upwards is said to be a total loss. (*Griswold's Fire Underwriters' Text-book*, § 1658.) In case of the actual destruction of the property, so as to be of no value, the assured recovers its agreed value. In the case of a partial loss, if the property insured is homogeneous, so that the damage sustained is susceptible of precise proportionate computation, then whatever proportional part of the property is destroyed by fire, the assured receives the same proportion of the agreed value of the whole. (See *Harris v. Eagle F. I. Co.* 5 Johns. 368.) As to the effect of valuation in a marine policy, see § 149. The doctrine of constructive total loss and abandonment is not recognized in the law of fire insurance. (*Rankin v. Potter*, Law R. 6 E. & I. App. 118;

Liscom v. Boston M. I. Co. 9 Met. 205, 211; *Trull v. Roxbury M. F. I. Co.* 3 Cush. 267, 268.)

"Total destruction" in fire policies.—In *Williams v. Hartford Ins. Co.* 5 Pac. C. Law J. 227, 54 Cal. R. 442, the policy against loss by fire contained the usual clause, "Damage to property not totally destroyed, unless the amount of damage is agreed upon between the assured and the company, shall be appraised by disinterested and competent persons, mutually agreed upon by the parties." An instruction to the jury that if they found that the building had lost its identity and specific character as a building, they might find that the property was totally destroyed within the meaning of the policy, was sustained on appeal. But the correctness of this decision is open to question. (See the editorial note to report of case in 9 Ins. Law J. 454.) The purpose for which the condition referred to was introduced was to ascertain by arbitration the amount for which the company was liable (if liable at all) under its policy. If the property was not overinsured, and was so completely destroyed as to leave nothing of any value behind, the insurers were clearly liable for the full amount of the policy. But if the property, though it had lost its identity and specific character as a building, was still of some value, notwithstanding the disastrous change it had undergone, the insurers were entitled to ascertain this value, for the purpose of determining what damage, covered by the policy, the assured had, in fact, sustained by the fire; and this they proposed to do, in accordance with the policy, by arbitration. "Total loss" in a marine policy, and "total destruction" in a fire policy, are not synonymous expressions.

Arbitration clause in fire policies.—Questions have been raised in respect to the validity of a condition, that suit shall not be brought on a fire policy until the amount of loss shall have been ascertained by arbitration, in the manner provided in the policy. (See

Flaherty v. Germania Ins. Co. 7 Ins. Law J. 226; also *Yeomans v. Girard F. & M. Ins. Co.* 5 Ins. Law J. 858, citing several cases and holding compliance with such condition to be a necessary prerequisite to the commencement of an action on the policy. See, however, distinguishing, *Roper v. London Ass. Co.* 1 El. & E. 825; *Gibbs v. International Ins. Co.* 13 Hun, 611. See also, limiting the application of this clause, *Lasher v. N. W. Nat. Ins. Co.* 18 Hun, 98.)

Recovery on valued policy.—When property insured in a valued fire policy sustains a partial loss, if such property be heterogeneous, so that the damage to or destruction of a portion of it furnishes no data from which to estimate in what proportion the entire property has been damaged or destroyed, the insured can only recover such amount, within the terms of the policy, as will enable him to repair the damage or loss sustained, without reference to the agreed value. Thus, if 1,000 barrels of flour, 100 hogsheads of wine, 50 firkins of butter, and 250 kegs of nails were insured in gross, at a valuation of \$7,000, and of these, 400 barrels of flour, and 20 hogsheads of wine were destroyed by a peril insured against, as it would be impossible to determine from the gross valuation in the policy what proportion of such valuation was to be considered as represented by the destroyed goods, the only mode of ascertaining the loss would be by treating the case as if the policy were an open one. But if a policy of \$6,000 has been issued on 1,000 barrels of flour, valued at \$6 each, it is obvious that if half the barrels of flour are lost by the peril insured against, the assured will be entitled to recover half the agreed value. In a valued policy of fire insurance, as in a similar marine policy, the valuation is conclusive on both parties. (*Borden v. Hingham M. F. Ins. Co.* 18 Pick. 523; *Fuller v. Boston M. F. Ins. Co.* 4 Met. 206; *Holmes v. Charleston M. F. Ins. Co.* 10 id. 211; *Phillips v.*

Merrimack Ins. Co. 10 Cush. 350; Luce v. Dorchester M. F. Ins. Co. 105 Mass. 297.)

Although the policy may state the value of the insured property, yet if it contains a stipulation that in case of loss the insurer will pay the actual value of the property at the time of the loss, this provision will create a strong presumption that the policy was not intended to be considered as a valued one. (Laurent v. Chatham F. I. Co. 1 Hall, 46, 47; Trull v. Roxbury M. F. I. Co. 3 Cush. 267, 268; Wallace v. Ins. Co. 4 La. 289; Brown v. Quincy M. F. I. Co. 105 Mass. 396. See also 3 Kent Com. *375, note b.)

CHAPTER IV.

LIFE AND HEALTH INSURANCE.

- § 164. Insurance upon life, when payable.
- § 165. Insurable interest.
- § 166. Assignee, etc., of life policy need have no interest.
- § 167. Notice of transfer.
- § 168. Measure of indemnity.

§ 164. *An insurance upon life may be made payable on the death of the person, or on his surviving a specified period, or periodically so long as he shall live, or otherwise contingently on the continuance or determination of life.*

Civ. Code Cal. 2762. N. Y. Civ. Code, 1519.

§ 165. *Every person has an insurable interest in the life and health:*

1. *Of himself;*
2. *Of any person on whom he depends wholly or in part for education or support;*
3. *Of any person under a legal obligation to him for the payment of money, or respecting property or services, of which death or illness might delay or prevent the performance; and,*
4. *Of any person upon whose life any estate or interest vested in him depends.*

Civ. Code Cal. 2763. N. Y. Civ. Code, 1520.

Proof of interest is essential in an action on a policy on the life of another. (*Ruse v. Mutual B. I. Co.* 23 N. Y. 516.)

§ 166. *A policy of insurance upon life or health may pass by transfer, will, or succession to any person, whether he has an insurable interest or not, and such person may recover upon it whatever the insured might have recovered.*

Civ. Code Cal. 2764. N. Y. Civ. Code, 1521.

The proposition stated in this section is in accordance with the decision of the Superior Court of New York in *St. John v. American L. I. Co.* 2 Duer, 419, affirmed by the Court of Appeals in 13 N. Y. 31. (See also *Conn. M. L. Ins. Co. v. Schæffer*, 4 Otto, 457; *Loomis v. Eagle L. I. Co.* 6 Gray, 398; *Insurance Co. v. Bailey*, 13 Wall.

Public policy.—Still it would seem that where such assignment is a mere cover for a speculating risk by a party who has no interest in the assured life, the assignment will be held void, as contravening the general policy of the law. (*Stevens Adm'r v. Warren Adm'r*, 101 Mass. 566; *Cammack v. Lewis*, 15 Wall. 643; *Conn. M. L. Ins. Co. v. Schæffer*, 4 Otto, 457.)

In Indiana it is held that a person having no interest in the life of the party insured cannot become the assignee of the policy, as in this case he occupies a position in which his interest is at variance with the continuance of the life insured. (*F. I. Co. v. Hazzard Adm'r*, 41 Ind. 120; *Franklin L. I. Co. v. Tifton Adm'r*, 53 id. 380.) The same doctrine is held in Kansas. (*Missouri Valley L. I. Co. v. Sturgis*, 18 Kan. 93; see *Stevens v. Warren Ins. Co.* 101 Mass. 564.)

Relationship as the basis of a policy.—In Pennsylvania it is held that a child has an insurable interest in the life of a parent. (*Reserve M. I. Co. v. Kane*, 81 Pa. St. 154.) In Illinois a contrary rule prevails. (*Guardian M. L. I. Co. v. Hogan*, 80 Ill. 35.)

But the mere relation of uncle and nephew has been held not to constitute an insurable interest which will enable either party to insure the life of the other. (*Singleton v. St. Louis M. I. Co.* 66 Mo. 63.)

To what extent mere relationship can serve as a basis for an insurance, apart from any pecuniary interest in the continuance of the life insured, is a question respecting which the authorities are not entirely harmonious. (See May on Insurance, § 107.)

§ 167. *Notice to an insurer of a transfer or bequest thereof is not necessary to preserve the validity of a policy of insurance upon life or health, unless thereby expressly required.*

Civ. Code Cal. 2765. N. Y. Civ. Code, 1522. .

§ 168. *Unless the interest of a person insured is susceptible of exact pecuniary measurement, the measure of indemnity under a policy of insurance upon life or health is the sum fixed in the policy.*

Civ. Code Cal. 2766. N. Y. Civ. Code, 1523.

It would seem that even where the interest of the person insured is susceptible of exact pecuniary measurement, the amount recoverable is the sum fixed in the policy, in the absence of an agreement, express or implied, to the contrary, or of a fraudulent concealment or misrepresentation, designed to cover a mere speculation on the life insured. (*St. John v. Am. L. I. Co.* 2 Duer, 419; 13 N. Y. 31; *Miller v. Eagle L. & H. Ins. Co.* 2 Smith E. D. 268, 302, 203; *Cammack v. Lewis*, 15 Wall. 643; *Conn. M. L. Ins. Co. v. Schæffer*, 4 Otto, 457.)

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